

LAND GRABBING, INVESTMENTS &  
INDIGENOUS PEOPLES' RIGHTS TO LAND  
AND NATURAL RESOURCES

**Case Studies and  
Legal Analysis**



Jérémie Gilbert

**IWGIA report 26**



**LAND GRABBING, INVESTMENTS &  
INDIGENOUS PEOPLES' RIGHTS TO  
LAND AND NATURAL RESOURCES:**

**CASE STUDIES AND LEGAL ANALYSIS**

Jérémie Gilbert

IWGIA – 2017

LAND GRABBING, INVESTMENTS & INDIGENOUS PEOPLES' RIGHTS  
TO LAND AND NATURAL RESOURCES:  
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## SYNOPSIS

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At the international level, indigenous peoples' rights to land and natural resources have been articulated under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and International Labour Organization (ILO) Convention 169. Indigenous peoples' rights to land are also protected by other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on Biological Diversity (CBD). At the regional level, the African Human Rights System and the Inter-American Human Rights System have also played a key role in the promotion and protection of indigenous peoples' rights to lands and natural resources. The *Awas Tingni* case in Nicaragua (Inter-American Commission on Human Rights, 2001), the *Endorois* ruling in Kenya (African Commission on Human and Peoples' Rights, 2010) and the *Ogiek* ruling in Kenya (African Court on Human and Peoples' Rights) are to good examples.

International law on indigenous peoples' land and natural resource rights includes the rights to own, use, develop and control their traditional land and natural resources. Indigenous peoples' land rights comprise both individual and collective rights, and States have the duty to ensure recognition and effective protection of indigenous peoples' land and resource rights. Indigenous peoples should not be displaced from their lands or territories and, if relocation is necessary, the affected indigenous peoples should give their free, prior and informed consent and be adequately compensated.

Despite the recognition and protection existing at the international and regional levels, indigenous peoples' rights to land and natural resources are very often violated and not respected at the national level, either by States or the private sector. While the phenomenon is not new, as indigenous peoples' rights have historically not been respected, there seem to be an increase in the forced displacement suffered by indigenous communities globally. In what has been labelled 'land grabbing', there has been a sharp acceleration in acquisition of lands globally, notably by foreign investors in search of arable land and natural resources. Land grabbing and external pressure on indigenous peoples' lands has become a widespread reality all around the world due to large-scale development projects, the establishment of

National Parks, conservation areas or game reserves, agro-investment projects, biofuel production, logging or extractive activities. Climate change mitigation and adaptation as well as green growth plans can also badly impact on indigenous peoples' rights to land and natural resources.

The Land Matrix Initiative (LMI), which is a global partnership aimed at improving transparency around large-scale land acquisitions by making these deals public, indicates that such acquisitions continue to be an important issue across the globe.<sup>1</sup> Over the past decade, almost 50 million hectares of land have been leased or bought from individuals, communities and governments for the large-scale production of biofuels, food, forest resources, industrial goods, infrastructure, tourism and livestock. The available data shows that, while the phenomenon is global, "Africa remains the most significant target area, with deals concluded in many countries across the continent. It accounts for 422 concluded agricultural deals (42% of all deals) and 10 million hectares (37%)."<sup>2</sup>

Many of these land deals are directly affecting indigenous communities, which are then forced out of their lands. Research done by Global Witness shows that, in Malaysia, less than five per cent of Sarawak's rainforest remains in a pristine state, unaffected by logging or plantations, with land deals over the forests mainly affecting indigenous peoples.<sup>3</sup> Another study found that 72 % of the Peruvian Amazon has been zoned for hydrocarbon activities, negatively impacting the rights of local indigenous peoples.<sup>4</sup> And, in Russia, indigenous peoples' territories are heavily affected by large energy projects such as pipelines and hydroelectric dams. In its report on Extractive Industries and Indigenous Peoples, the UN Special Rapporteur on the rights of indigenous peoples also points out that because of "the worldwide

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1 See <http://landmatrix.org/en/>

2 Analytical Report of the Land Matrix II - International Land Deals for Agriculture - Fresh insights from the Land Matrix (October 2016).

3 Global Witness (2013) "Inside Malaysia's Shadow State: Backroom deals driving the destruction of Sarawak", available at: <https://www.globalwitness.org/en/campaigns/forests/inside-malaysias-shadow-state/>

4 Matt Finan and Martí Orta-Martínez (2010) "A second hydrocarbon boom threatens the Peruvian Amazon: trends, projections, and policy implications", *Environmental Research Letters*, Volume 5, Number 1.

drive to extract and develop minerals and fossil fuels [...] coupled with the fact that much of what remains of these natural resources is situated on the lands of indigenous peoples [...] indigenous peoples around the world have suffered negative, even devastating, consequences from extractive industries.”<sup>5</sup> This global pressure on the few natural resources left on indigenous territories, the rapid growth in the extractive industry, and the need for the exploitation of the natural resources are putting new strains on indigenous peoples’ rights over their ancestral territories.

State and private actors such as corporations, but also international investors and donor agencies, are at the heart of such a ‘land rush’, which does not comply with international legal standards regarding indigenous peoples’ rights. Increasingly, donor agencies are focusing on economic growth and providing substantive support to the private sector to support green growth and large development activities. Many agencies have adopted a similar focus but are lacking proper mechanisms to ensure that the fundamental rights of indigenous peoples, and notably their right to free, prior and informed consent, are respected.

IWGIA and its partner organizations in Africa, Asia, Latin America and Russia have, through many of their projects, been addressing the problem of land grabbing. IWGIA has supported, among others, projects related to land titling, monitoring and documenting of gross viola-

tions of indigenous peoples’ rights to land and natural resources, strategic litigation, policy lobbying, community awareness-raising and mobilization. IWGIA and its partners have also been active in raising this issue in relevant international and regional fora, such as the UN Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, Universal Periodic Review, UN Treaty bodies, African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights, UN Working Group on Business and Human Rights.

Based on this experience over the last few years, and reflecting on the acceleration in the global ‘land grab’, IWGIA organized a workshop to take stock and reflect on the situation. The workshop was held in Copenhagen, Denmark, from 29-30 October 2014. The seminar was attended by IWGIA’s partners from India, Myanmar, Kenya, Tanzania, Colombia, Chile and Russia, as well as by the UN Special Rapporteur on the rights of indigenous peoples, the Finnish Ministry of Foreign Affairs, the Danish Ministry of Foreign Affairs, many Danish and international NGOs, the Danish National Human Rights Institute, experts and representatives from the private sector, including DONG Energy, Deloitte and IFU (Investeringsfonden For Udviklingslande) as well as IWGIA’s staff, members and board. Building on this seminar, this report offers an analysis of the issue of land grabbing, investment and the impact it has on indigenous peoples.

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5 Report A/HRC/24/41, “Extractive industries and indigenous peoples. Report of the Special Rapporteur on the rights of indigenous peoples” (2013)

# INTRODUCTION

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Over the last few years, the very large increase in land investments - mainly in developing countries - has given rise to an increased reference to 'land grabbing' or 'land grab', terms which have now entered the lexicon of most of the media. While it is true for most indigenous communities that deprivation and violation of their right to land is not a new phenomenon, it is also true that the more recent 'land grabbing' phenomenon has a particularly rapid and negative impact on indigenous peoples' rights. Hence, while 'land grabbing' may be seen as the continuation of an historical process of constant invasions of indigenous peoples' lands, it nonetheless seems that we have witnessed a significant increase in the large-scale appropriation of land over the last few years.

This 'land rush' is driven by the increased marketization of land and its production potential. This is the result of many related phenomena, including the globalization of agricultural production, the quest for food security by countries lacking arable lands, the strive for investment in energy and biofuel security ventures and other climate change mitigation strategies, as well as recent demands for resources from newer hubs of global capital. The combined food and financial crises of 2007/08 were key triggers of the recent wave in large-scale land investments, with equity investors and pension funds in particular seeking new asset classes for investment. Since then, land and investments in agricultural and food production have been seen as a key area for safe, fast and reliable investment by most public and private investors. In parallel to this process, increased investment in the production of biofuels has also had a very significant impact on the global land rush. The pace and scale of land acquisitions globally have dramatically increased in recent years as a result of changes in commodity markets, agricultural investment strategies, land prices, and a range of other policy and market forces, and this has resulted in massive investments in land acquisitions across the globe.

In this global quest for land and natural resources, indigenous peoples are particularly negatively impacted.

While most local communities, peasants, farmers and other local land users are affected by this global land rush, embedded discrimination, a lack of recognition of land tenure and vulnerability mean that this recent land rush is affecting indigenous peoples particularly badly. The following report aims to examine the impact of land grabbing on the rights of indigenous peoples. The aims of the report are to offer a 'map' of the main issues affecting indigenous peoples, explore the relevant legal framework and offer some recommendations as to how it could be addressed through a more systematic and cross-regional approach.

To support such aims, the report is divided into three different sections as follows:

The first section provides an overview of land grabbing, land rights and human rights in relation to indigenous peoples' rights. It examines the definition(s) of land grabbing in terms of how it differs from other forms of land dispossession, the scale of such land grabbing, the industries involved and how this affects indigenous peoples generally.

The second section illustrates case studies of investments made by donors, financial institutions, private actors and States that could or already have led to grabbing of indigenous peoples' land in Tanzania, Kenya, Central India, Myanmar, Colombia, Argentina, Chile and Russia. It also maps out the relevant existing national laws and regulations in place in these countries.

The third section focuses on the law and how international law could be used in the context of current land grabbing. This section concentrates on international human rights law but also on other legislation on investments treaties, arbitration and other legal initiatives that is relevant to understanding how land grabbing touches on many areas of the legal framework. This section also focuses on the business and human rights approach currently being developed by the United Nations in order to evaluate its relevance in the context of land grabbing.

## SECTION 1: WHAT IS 'LAND GRABBING'?

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### 1.1. Definition, specific features and scale

'Land grabbing' has many different definitions but what they all have in common is the idea that it involves the large-scale acquisition of land for commercial or industrial purposes, such as agricultural and biofuel production, mining and logging concessions, big infrastructure development or tourism.<sup>6</sup> Most definitions agree that it involves acquiring more than 200 hectares, with some pushing for a threshold of 1,000 hectares, many involving more than 10,000 hectares and several more than 500,000 hectares.<sup>7</sup> In any case, it concerns large-scale land acquisition. It also involves land being acquired by investors rather than producers, very often foreign investors.<sup>8</sup>

There is also a much more negative aspect of the definition of land grabbing as it refers to the fact that such large-scale acquisitions are undertaken with limited (if any) consultation of the local communities, limited (if any) compensation, and a lack of regard for environmental sustainability and equitable access to, or control over, water resources.

Many civil society organizations have also come up with their own definition of land grabbing, in particular highlighting the fact that it takes place when land investors have infringed procedural and substantive rights. For example, the International Land Coalition's Tirana Declaration defines land grabbing as acquisitions or concessions that are one or more of the following:

- in violation of human rights, particularly the equal rights of women;
- not based on free, prior and informed consent of the affected land users;

- not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered;
- not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and;
- not based on effective democratic planning, independent oversight and meaningful participation.<sup>9</sup>

There have been a number of debates to decide whether 'land grabbing' is truly a new phenomenon or simply a continuation of the colonial foreign land grabbing endeavours aimed at ensuring the marketization of natural resources.<sup>10</sup> Arguably, land grabbing is not a new phenomenon since forced dispossession of the local population from their land in order to ensure the commercial exploitation of their natural resources is unfortunately part of our global history; however, this current wave of land grabbing is nonetheless based on important shifts in terms of land usage and agricultural production.<sup>11</sup> While at the local level there may be some variation, the overall global picture shows that there is a current move towards the large-scale acquisition of land by foreign investors with the aim of either:

- converting local forms of so-called 'unproductive' domestic food production to the large-scale agricultural export of food; or
- converting lands (often forest lands) for the production of biofuels for export.<sup>12</sup>

Hence, what seems to distinguish this current wave of land grabbing from previous ones is its relatively fast and

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6 Transnational Institute (2013) "The Global Land Grab: A Primer" (TNI, Agrarian Justice Programme, February 2013).

7 The 200-hectare figure comes from the International Land Coalition's definition of 'large scale'. Not only is 200 hectares ten times the size of a typical small farm but, according to the latest Food and Agricultural Organisation-led World Agricultural Census, it is also larger than the average land holding in all but three developing countries.

8 Although the distinction between national and foreign investors can sometimes be blurred by the partnerships organized between national and foreign entities.

9 See: <http://www.landcoalition.org/about-us/aom2011/tirana-declaration>

10 See: L.A. Wily (2012) "Looking back to see forward: the legal niceties of land theft in land rushes" *Journal of Peasant Studies* 39(3-4), p. 752.

11 See: S. Borras and J. Franco (2012) "Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis", *Journal of Agrarian Change*, 12(1), 34–59.

12 For more detailed analysis, see: Borras, S. and Franco, J. (2010) "Towards a broader view of the politics of global land grab: re-thinking land issues, reframing resistance." Working Paper Series No. 001. Initiatives in Critical Agrarian Studies (ICAS). The Hague: International Institute of Social Studies (ISS).



global pace, driven largely by new investment strategies focused on investing in food and biofuel production. Agribusiness and food and biofuel production as sources of investment seem to be the key drivers of this new wave of land grabbing. This current wave of land grabbing also seems quite specific in terms of the timescale of the acquisitions. These are usually conducted under very long-term 'leases' or contracts to use the land (very often 99-year leases) and covering very large tracts of land (some of the deals have included more than 30,000 ha).

It is hard to obtain an exact figure on the scale of the phenomenon, notably due to the lack of transparency of most of the land deals. Nonetheless, several studies on the scale of the phenomenon have been undertaken. In 2009, the Food and Agriculture Organization (FAO) estimated that, over the 2007 to 2009 period, foreign investors acquired at least 20 million hectares in Africa.<sup>13</sup> In 2009, the International Food Policy Research Institute (IFPRI) estimated that, between 2006 and 2009, deals were being negotiated for 15 to 20 million ha of farmland in developing countries.<sup>14</sup> More recent figures from 2012 note that at least 80 million hectares of fertile farmland have been leased to foreign investors, involving some US\$100-140 billion in Africa alone.<sup>15</sup> A 2011 report from Oxfam refers to 227 million hectares acquired since 2000.<sup>16</sup> Overall, however, it is very hard to gain a full and global picture of how much land has been 'grabbed' since 2007/08, apart from the fact that these investments are extremely significant both in terms of the land area covered and the scale of the investments.<sup>17</sup> Regarding the scale of the land rush, it is also worth highlighting that it is a truly global phenomenon. While the continent that is witnessing the greatest level of land grabbing is clearly Africa, similar extensive takeovers of large tracts of land by foreign investors have also been taking place in Asia, Latin America and the former Soviet countries. Many of these land deals are directly affecting indigenous communities, who are then forced off of their lands.

## 1.2. Investors and industries leading the 'land grab'

In terms of the kinds of investors involved, media and civil society reports largely point to the large investments emerging from China, India, South Korea and the Gulf States, which are among those at the forefront of this agricultural expansion, as they seek to produce food overseas for their growing populations. However, according to a 2009 analysis from the United Nations Conference on Trade and Development, the biggest country investors in terms of outward foreign direct investment (FDI) stock in agriculture are, in descending order: the United States, Canada, China, Japan, Italy, Norway, Korea, Germany, Denmark and the United Kingdom.<sup>18</sup>

Moreover, regarding the investors, it is worth bearing in mind that most deals are private investments. This notably involves many Western banks and financial investors seeking alternatives to volatile international financial markets. In terms of the relationship between investors, financial institutions, agribusiness and governments, it is often hard to get a clear picture of who is who between grabbers, investors and destination markets given that, in most situations, the land deals lack transparency and also involve multiple layers of different actors. However, it seems that two main types of industry are leading the way: agribusiness and green investors.

Agriculture, and more particularly agribusiness, animal feedstock and agro-fuels, seems to be the main driver of the land rush. It is being driven by a number of profound and long-term changes in the fast-growing demand for food and energy. As noted by the Transnational Institute, the expanding volume and changing diet and consumption patterns of fast-growing, large economies and notably the 'meatification of diets', which requires ever increasing use of land to produce animal livestock, has a huge impact on the demand for land.<sup>19</sup> In turn, this attracts investments in land to produce soya and corn for animal consumption. Likewise, the emergence of 'flex crops'<sup>20</sup> has also had a major impact as land is being acquired at a fast pace to produce such crops, to the detriment of local food production.

13 Foreign Investment in Developing Country Agriculture – Issues, Policy Implications and International Response. David Hallam. Paper presented at the Global Forum on International Investment, OECD, 7-8 December 2009.

14 Von Braun, J. and Meinzen-Dick (2009), R., "Land grabbing" by foreign investors in developing countries: risks and opportunities'. Policy Brief No. 13, April. Washington, DC: International Food Policy Research Institute.

15 For detailed figures see the Land Matrix Project, see: <http://www.landmatrix.org/en/>

16 Oxfam (2011), "Land and Power: The growing scandals surrounding the new wave of investment in land".

17 See: Lorenzo Cotula & Emily Polack (2012) "The global land rush: what the evidence reveals about scale and geography", IIED Briefing, Apr 2012, available at: <http://pubs.iied.org/17124IIED.html>

18 See: United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2009, Geneva, July 2009, p. 118.

19 Transnational Institute (2013) "The Global Land Grab: A Primer" (TNI, Agrarian Justice Programme, February 2013).

20 Flex crops are crops that have multiple uses (food, feed, fuel, industrial material) and which can be easily and flexibly interchanged: soya (feed, food, biodiesel), sugarcane (food, ethanol), oil palm (food, biodiesel, commercial/industrial uses), corn (food, feed, ethanol).

The forestry sector is also having a major impact on the rapid expansion of large-scale land acquisitions, notably through fast-growing industrial tree plantations (ITPs). This has been seen in the acquisition of forestlands and their transformation for the production of 'valuable' trees such as eucalyptus and pine, which are commonly grown for their commercial value throughout the world.<sup>21</sup> One very significant change in the forestry industry is that forestlands are now being acquired for the large-scale production of biofuels, notably palm oil. The current land rush is largely driven by 'green investments' since there has been a dramatic increase in investment in biofuels and carbon offsetting measures in particular in the last few years. These 'green investments' are having a dramatic impact on the land rush as lands that could be used for green production are seen as a great and reliable source of investment for investors.

These investments in biofuels have also been fuelled by the adoption of inter-State initiatives to develop green energy and carbon offsetting markets, such as the EU targets on biofuels in its Renewable Energy Directive, as well as carbon markets and offsets under approaches such as the European Trading Scheme. This also includes international agency initiatives that support the development of green investment or of a carbon market such as, for example, the World Bank's Forest Carbon Partnership Facility (FCPF). These different targets for emissions reductions that are emerging at national, regional and global levels mean that the demand for biofuels will only increase in the next few years.

One of the largest global initiatives is emerging from the UN Reducing Emissions from Deforestation and Degradation (REDD+) programme, which aims to curb carbon emissions by paying developing countries to protect forests. The programme has been re-developed several times over the last few years but reached an important milestone in 2013 when delegates at the United Nations climate negotiations in Warsaw adopted a framework that would allow REDD+ programmes to move forward. Despite the fact that this programme is meant to ensure that local communities are not negatively affected by the development of such a large-scale carbon market, reports from the ground clearly indicate that the reforms that have been put in place by most governments have so far had a very negative impact. The REDD+ programme has thus far done very little to help secure tenure rights for local forest communities,

despite warnings from civil society groups that local land rights would be critical for its success.<sup>22</sup>

There has also been a noticeable increase in the acquisition of lands for conservation purposes. This phenomenon has been labelled 'green grabbing'.<sup>23</sup> This 'green grabbing' includes acquiring lands for the development of 'green' markets such as forestry for carbon offsetting, biofuels and ecotourism. Finally, another ever-expanding industry that is having a significant impact on the current land rush is tourism. Massive investments in tourism, notably across Africa, have meant that lands have been acquired on a huge scale for game farms and safari and hunting operations in several countries across the region.

Overall, it is hard to distinguish all the sources of land grabbing as there is a huge diversity of contexts at the local level but it seems that the global movement for the fast, large-scale and long-term acquisition of lands is driven mainly by the agribusiness, forestry, biofuels and tourism industries. A study by the World Bank highlights the fact that the vast majority of the investments in land are thought to be for the production of food crops for export although about one-third are understood to be for plantations of biofuel crops.<sup>24</sup> A global report commissioned by the G20 leaders in 2011, which was conducted by 10 international organizations including the FAO, World Bank, OECD and World Food Programme, found that the demand for food and feed crops and for the production of biofuels is a significant factor in rising food prices and food price volatility globally.<sup>25</sup>

Moreover, it is worth keeping in mind that significant investment in agricultural and biofuel production also requires major investment in infrastructure such as roads, ports and hydro-dams. In turn, these infrastructural investments also lead to displacement from the land and forced relocation. The current land rush for agribusiness and green investments is occurring alongside the increased grabbing of land for mining and oil exploration in regions not used to such investments. New mining

21 M. Kroger (2012) "Global tree plantation expansion: a review", ICAS Review Paper Series No.3., p.5.

22 See: Rights and Resources Initiative, Briefing: Status of Forest Carbon Rights and Implications for Communities, the Carbon Trade, and REDD+ Investments (March 2014), available at: [http://www.rightsandresources.org/documents/files/doc\\_6594.pdf](http://www.rightsandresources.org/documents/files/doc_6594.pdf)

23 See for example: James Fairhead, Melissa Leach & Ian Scoones (2012) "Green Grabbing: A new appropriation of nature?", *Journal of Peasant Studies*, 39:2, 237-261.

24 World Bank (2010) "Rising global interest in farmland: can it yield sustainable and equitable benefits?", 8 September 2010. Washington, DC: The World Bank.

25 Price Volatility in Food and Agricultural Markets: Policy Responses, Policy Report including contributions by FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTF (2 June 2011).

technologies and the higher price of natural resources in recent years have pushed their demand to even higher levels than before. This high demand for natural resources, coupled with new territories to be exploited, such as the new areas emerging under the ice cap in the Arctic Circle, have meant that a 'mining land grab' is also taking place in parallel with the so-called green grab.

### 1.3. Indigenous peoples and land grabbing: main issues

Many are directly affected by the global rush for land investment but indigenous peoples are particularly affected. For many indigenous communities across the globe, the current wave of land grabbing is simply another chapter to be added to previous centuries of land dispossession. These large-scale land deals usually result in the curtailing of customary or community access rights to lands, forest or natural resources, resulting in a loss of access to common land and waterways used for activities such as hunting, gathering of forest products, fishing and grazing. While many local communities across the globe, and especially in Africa, do not hold formal title to their lands, indigenous peoples are especially vulnerable to a lack of recognition of their rights to land and natural resources. In most situations, indigenous peoples' land rights are neither recognized nor protected by governments. As noted by the United Nations Inter-Agency Support Group: "the lack of formal State recognition of traditional tenure systems marginalizes indigenous peoples further from the dominant society and leaves them more vulnerable to rights abuses."<sup>26</sup> So when an investor or a company negotiates a lease with a government, the land rights of indigenous peoples are simply ignored.

The notion of productivity of the land, which is meant to support the flow of foreign investments and support large-scale export industries, particularly affects many of the indigenous communities whose systems of livelihood production are based on sustainable methods of land use perpetuated across the centuries. A justification for this ignorance of indigenous peoples' land rights relates to a colonial narrative around the concept of 'empty', 'va-

cant' or 'unused' land. Historically, indigenous peoples have been the main victims of such rhetoric, based on the idea that their land is 'unoccupied' or 'unproductively' used. In many ways, the current land grabbing is based on the same premise, which saw the occupation of land by indigenous communities as not 'civilised' enough to constitute 'proper' tenure of the land. This fiction, labelled '*terra nullius*' during colonial times, has been rejected as racist and discriminatory by most legal systems across the world. However, although once rejected, the theory that some lands are not occupied when indigenous peoples live on them seems to be coming back, under the precept of 'unused' or 'vacant' land, in order to justify the forced removal of indigenous peoples to make way for commercial and industrial developments.

Through the United Nations, the international community recognized the legitimacy of indigenous peoples' claims to land rights and self-determination with the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007. However, the food and financial crises of 2008 gave rise to a new wave of massive land grabbing which largely ignored the indigenous peoples' rights as proclaimed in the new declaration. For many indigenous communities, these huge investments in land for commercial and industrial purposes are not only denying them access to their primary source of livelihood but are also leading to deforestation and a change in the biodiversity of their ancestral lands and territories. Forest-reliant communities are badly affected as large areas of the forest have been cleared to make space for the large-scale production of food or biofuels. Some of the most prominent cases involve physical harassment, intimidation and violence against indigenous peoples.

The current land grabbing is yet another tragic chapter in the history of indigenous peoples' dispossession from their land. Given the scale and universality of the current land grabbing, it is essential that indigenous organizations, supportive civil society, and also organizations that do not traditionally work to support indigenous peoples' rights, realize that this chapter of global 'land grabbing' could prove extremely detrimental to all recent progress made in the recognition and protection of indigenous peoples' land rights.

26 United Nations Inter-Agency Support Group, "Thematic Paper on Lands, Territories and Resources" (Thematic Paper towards the preparation of the 2014 World Conference on Indigenous Peoples, July 2014), p. 4, available at: [http://www.un.org/en/ga/president/68/pdf/wcip/IASG\\_Thematic%20paper\\_Lands,%20territories%20and%20resources.pdf](http://www.un.org/en/ga/president/68/pdf/wcip/IASG_Thematic%20paper_Lands,%20territories%20and%20resources.pdf)

## SECTION 2: COUNTRY OVERVIEW

The following section aims to offer an overview and initial analysis of the impact of land grabbing on indigenous peoples' rights in selected countries. It is based on presentations made by IWGIA's partners from Tanzania, Kenya, India, Myanmar, Colombia, Chile and Russia during the IWGIA seminar on land grabbing held in October 2014. This country focus does not mean that land grabbing is not seriously affecting indigenous communities in other countries but rather that the situation in these countries can serve to illustrate what is happening on a more global scale. The aim is not to provide a detailed and comprehensive review but rather to provide some initial reflections on land grabbing and its impact at the local level with a view to triggering a more in-depth analysis. Each country section provides: (1) an overview of the indigenous peoples involved; (2) an illustration of how land grabbing is directly affecting them; (3) an overview of the relevant national legal framework in the context of land grabbing.

### 2.1. Land grabbing and indigenous peoples in Africa

As highlighted in the first section, sub-Saharan African countries have been particularly affected by land grabbing. A 2009 study entitled "Land Grab or Development Opportunity?" jointly produced by the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED) analysed land acquisitions of 1,000 hectares or more between 2004 and 2009 in Ethiopia, Ghana, Madagascar and Mali. The study concluded that, in general, recent national land policies, stakeholder interactions and privatization schemes have all interacted to facilitate large-scale land acquisitions across the continent, which has witnessed the massive acquisition of land as part of the global land rush.<sup>27</sup> The following analysis examines the situation in two countries, Tanzania and Kenya, which have been experiencing intensive land grabbing over the last few years.

27 Cotula, L., Vermeulen, S., Leonard, R., and Keeley, J. (2009) "Land Grab or Development Opportunity?", Agricultural Investment and International Land Deals in Africa (2009).

#### Tanzania<sup>28</sup>

The indigenous peoples of Tanzania include the Maasai, Barabaig, Akie, Taturu and Hadzabe. The first two groups are predominantly pastoralists while the latter comprise forest-dwelling hunter-gatherers. Pastoralism constitutes an important source of livelihood for many communities that rely on livestock grazing. The rights of pastoralist communities have been particularly affected by the recent waves of large-scale land grabbing as these have notably been taking place on pastoralists' lands.<sup>29</sup> An important project which has affected indigenous peoples is the Southern Agricultural Growth Corridor of Tanzania (SAGCOT). Covering approximately one-third of mainland Tanzania's total land area (including all administrative regions, namely Morogoro, Iringa, Mbeya, Ruvuma, Lindi and Mtwara), the SAGCOT project links Dar-es-Salaam port to Malawi, Zambia and the Democratic Republic of Congo. While the idea behind SAGCOT was adopted during the World Economic Forum for Africa held in Dar-es-Salaam in 2010, it is part of the broader UN General Assembly's 2008 proposal for the "African Agricultural Growth Corridor". At the domestic level, SAGCOT fits well with *Kilimo Kwanza* policy (Agriculture First), as the former being the vehicle for implementing the latter. *Kilimo kwanza* is a national policy aimed at bringing about agricultural transformation, modernisation and commercialization, which was formed by the Tanzania National Business Council (TNBC).<sup>30</sup>

Under this national policy, the acquisition of land for agriculture, and also biofuel production, has been dramatically increasing. By 2009, an estimated four million

28 This section is notably based on the paper presented by Elifuraha Laltaika, "Land Grabbing and Indigenous Peoples: A Case Study of the Southern Agricultural Growth Corridor of Tanzania (SAGCOT)" (IWGIA Seminar on Land Grabbing – October 2014).

29 See "Tanzania Pastoralists threatened: eviction, human rights violations and loss of livelihood" (IWGIA Report 23 – January 2016).

30 According to the SAGCOT Investment blue print, the aim is to invest US\$ 2.1 billion over a twenty-year period for the purpose of tripling the area's agricultural input. In this connection, while commercial farmers currently farm only 110,000 hectares, mainly for sugarcane and tea production, SAGCOT expects to raise the number to 350,000, insisting that much of it will be farmed by small-scale farmers.





*Impoverished pastoralists and starving livestock in Morogoro region. Photo: IWGIA archive*

hectares had already been requested from the Tanzanian government, through the Tanzania Investment Centre, for biofuel projects, with around 640,000 ha having been formally allocated.<sup>31</sup> The lands in question are often acquired to the detriment of the local populations, who are losing important sources of livelihood, and who do not usually receive proper compensation for their loss of land. Such large-scale acquisitions of land are usually based on the wrong assumption that the concerned lands constitute 'empty', 'underused', 'idle' or 'degraded' lands, despite the fact that they are often part of indigenous peoples' customary and ancestral territories, and used as an essential source of livelihood.

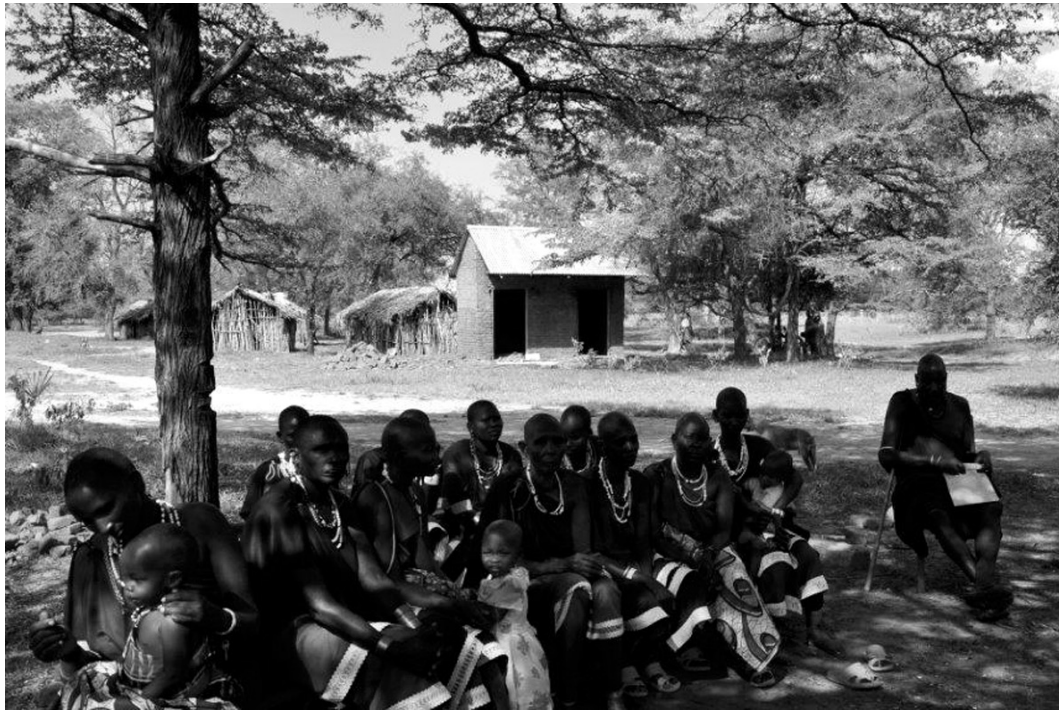
Current legislation establishes that foreign investors must acquire land through the Tanzania Investment Centre (TIC). According to TIC guidelines, any investor must present a business plan before applying for land. The TIC can then allocate land from its 'land bank'. In theory, the investor should then be introduced to the respective villagers who have an interest in the concerned lands to present a proposal to the village council. If accepted, a process of land mapping should then be undertaken to

identify, demarcate and value the land. However, there are several problems with such a process. An in-depth study and primary-based research led by the Stockholm Environment Institute in 2013 highlighted in detail how national land-use planning policies have created ambiguities that are likely to be exploited by powerful investors.<sup>32</sup> First of all, many firms are circumventing the official process and negotiating directly with local communities. Secondly, even if the formal process is followed, one of the problems is that once village land has been leased to investors, local people no longer have legal rights pertaining to it until ownership returns to the village, normally after a 99-year lease. Thirdly, even when compensation is provided, villagers have highlighted that most people who have moved to make way for investors have been offered only small amounts of poor-quality land in return.

Agriculture and biofuel are not the only industries causing large-scale land grabbing in Tanzania as tourism also accounts for a large proportion of the investment in the country. There are several examples of cases where plans to increase tourism in Tanzania are directly resulting in the massive and large-scale grab-

31 Sulle, E. & Nelson, F. (2013), "Biofuels, land tenure, and rural livelihoods in Tanzania" (London: International Institute for Environment and Development, 2009). And see: Emmanuel Sulle (2013) "The Status of Biofuels Projects in Tanzania" (Overseas Development Institute, March 2013).

32 Atakilte Beyene, Claude Gasper Mung'ong'o, Aaron Atteridge, and Rasmus Kløcker Larsen (2013) "Biofuel Production and its Impacts on Local Livelihoods in Tanzania: A Mapping of Stakeholder Concerns and Some Implications for Governance" (Stockholm Environment Institute, Working Paper 2013).



Maasai community in Morogoro. Photo: IWGIA archive

bing of indigenous territories. This often takes the form of acquiring land to provide more wildlife corridors and parks which, in turn, will be used for tourism purposes. One of the most well-known illustrations of this situation relates to the Maasai of Loliondo in Ngorongoro district, who have been resisting the appropriation of their land for the establishment of a wildlife corridor. The proposed wildlife corridor would expand tourism and big game hunting. The development of the corridor means that the Maasai community will lose over 1,500 square kilometres of essential dry season grazing land. The main economic activity and source of livelihood of the people of Loliondo is pastoralism – moving livestock between seasonal grazing areas, and so losing access to these grazing lands will mean losing their main source of livelihood. The situation came to a head in 2009 when the Tanzania Field Force Unit intervened to forcibly evict up to 300 households from the Maasai communities. During the eviction, the villagers lost their property, including cows and goats, and witnessed their clothes, money and utensils destroyed by fire.<sup>33</sup> While the situation in the following years calmed down, and the Prime Minister in

2013 assured the people that the land belongs to the people as villages, the conflict intensified again in 2016 when new demands for eviction of the people emerged through the Ministry of Natural Resources and Tourism. In August 2017 forced evictions took place again, resulting in serious human rights violations.

There are numerous examples of situations in Tanzania where wildlife and tourism expansion are resulting in the grabbing of indigenous lands. While the situation in Loliondo has received a vast amount of national and international attention, this situation is unfortunately not an isolated one. Over the last two years, 2015 and 2016, there have been several reported cases of forced evictions to make way for tourism and wildlife developments.<sup>34</sup>

It is worth noting that the private sector and foreign investors are playing a very central role in these evictions and land grabs. A good illustration of the combination of forced eviction by the government and large-scale acquisition of land by private foreign interests can be found in the situation faced by some of the Maasai communities of Mondorosi, Soitsambu and Sukenya. These communities have been facing a loss of land and

<sup>33</sup> See: FEMACT's Loliondo Fact Finding Report of August 2009; and see: Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, [Ref: A/HRC/15/37/Add.1, 14/9/2010], paragraph 445, page 181.

<sup>34</sup> See Minority Rights Group (2016) "Tanzania: Protecting Maasai right to land": <http://minorityrights.org/law-and-legal-cases/mondorosi-sukenya-and-soitsambu-village-councils-v-tanzania-breweries-limited-tanzania-conservation-ltd-ngorongoro-district-council-commissioner-for-lands-and-attorney-general-tanzania/>





*Pastoralists in Tanzania. Photo: IWGIA archive*

forced eviction due to the action of Thomson Safaris, a US-based tourism operator offering deluxe safari tourism services. The villagers' struggle against Thomson began in 2006 when Tanzania Conservation Ltd (TCL) acquired 12,617 acres of land known as Sukenya Farm, which originally belonged to the Maasai.<sup>35</sup> There have been reports of forced and violent evictions of the local communities. Again, the situations mentioned here are merely illustrations of the overall situation, as there are many other examples of forced evictions of indigenous communities in Tanzania for the purpose of using their land for large-scale farming, tree plantations (notably biofuel production), conservation areas, tourism and commercial game hunting.

The current phenomenon of land grabbing is supported by weak land rights legislation that does not provide adequate protection or recognition of indigenous land rights. Despite having one of the most advanced land rights framework, providing some recognition of customary ownership, Tanzania's national legislation remains weak and inadequate when it comes to the large-scale acquisition of land by foreign investors. The main

laws governing land tenure and ownership in Tanzania are the Land Act No. 4 and the Village Land Act No. 5 respectively. The Interpretation section of the Village Land Act stipulates that village land means the land declared to be village land in accordance with Section 7 of the Village Land Act. The main threat posed to indigenous pastoralists and hunter-gatherers by this law relates to the definition of 'General Land' as provided for in the Land Act. This law defines 'General Land' as meaning "all public land which is not reserved land or village land and includes unoccupied or unused village land". As noted by many indigenous organizations: "This provision runs contrary to land-use patterns by pastoralists and hunter-gatherers. Pastoralism, for example, requires movement from a point of resource abundance to the point of resource scarcity. In the course of these movements, pastoral ancestral land is regarded as unused and hence susceptible to grabbing for other land uses."<sup>36</sup> Moreover, the recent revision of the provisions

<sup>35</sup> TCL is owned by the same American businessmen as Thomson Safaris, a Watertown-based company that runs luxury tours on the disputed property, which it has developed into a private nature reserve.

<sup>36</sup> Shadow report concerning the situation of the economic, social and cultural rights of indigenous pastoralists and hunter-gatherers of the United Republic of Tanzania, submitted by the Coalition of Indigenous Pastoralist and Hunter Gatherer Organizations. Combined initial, second and third periodic reports of the United Republic of Tanzania submitted to the International Covenant on Economic, Social and Cultural rights (UN doc E/C.12/TZA/1-3, 28 March 2011) on the occasion of the 48th session of the Committee on Economic, Social and Cultural Rights.



of the Wildlife Conservation Act 2009 has further amplified this lack of land rights protection. Section 21(1) of this law provides that: “Any person shall not, save with the written permission of the Director [of Wildlife] previ-

ously sought and obtained, graze any livestock in any game controlled area.” In practice, this means that indigenous pastoralists could be forcibly removed from their lands when such land is designated as wildlife areas.

## Kenya<sup>37</sup>



*Women from the Samburu people who might be effected by the LAPSSET corridor project. Photo: IWGIA archive*

In Kenya, the peoples who identify with the indigenous movement are mainly pastoralists and hunter-gatherers, as well as some fisher peoples and small farming communities. Pastoralists are estimated to comprise 25% of the national population, while the largest individual community of hunter-gatherers numbers approximately 79,000.<sup>38</sup> Both pastoralists and hunter-gatherers face land and resource tenure insecurity, poor service delivery, poor political representation, discrimination and exclusion. Land grabbing has had a dramatic effect on land tenure for many of the country's indigenous communities in the last few years. Land grabbing has taken many forms in Kenya but, like other countries in the region,

it is driven mainly by large-scale agribusiness developments, the quest for biofuels, geothermal production, wildlife conservation, tourism, mining, and infrastructure development. This includes the Lamu Port Southern Sudan-Ethiopia Transport (LAPSSET) Corridor project. The Government of Kenya has been very proactively supporting increased foreign investment in these sectors. An important driver of such a move is embedded in the national economic development plan “Vision 2030”, which aims to support the development of “a globally competitive and prosperous nation with a high quality of life by 2030”.<sup>39</sup> The government has made foreign direct investment in agribusiness a key driver of such a development plan.

The key investments of the LAPSSET corridor project include a seaport at Kenya's coastal town of Lamu,

<sup>37</sup> This section is notably based on the paper presented by Kanyinke Sena “Indigenous Peoples’ Rights to Land and Natural Resources, Investment and Land Grabbing: The case of the LAPSSET Corridor, Kenya” (IWGIA Seminar on Land Grabbing – October 2014).

<sup>38</sup> IWGIA (2016) “The Indigenous World 2016”, available at: [http://www.iwgia.org/publications/search-pubs?publication\\_id=740](http://www.iwgia.org/publications/search-pubs?publication_id=740)

<sup>39</sup> See: <http://www.vision2030.go.ke>

a road, a railway and oil pipeline from Lamu to Juba in South Sudan with branches running from Isiolo (Kenya) to Addis Ababa (Ethiopia) and from Hoima in Western Uganda to connect with the LAPSSET oil pipeline in Juba, South Sudan. Oil refineries will be constructed in Lamu and Isiolo while resort cities will be developed in Lamu, Isiolo and Turkana. Two large dams will also be constructed in High Grand Falls along the River Tana and at the Crocodile Jaws in Isiolo/Samburu border. All the required investments in land acquisition will have, and are already having, a negative impact on several indigenous communities. Potential income from LAPSSET projects, corrupt land deals coupled with pains from historical injustices has heightened inter-community tensions and conflicts along the LAPSSET corridor over the last few years.

There are many examples of large land leases to foreign investors in Kenya, many of which have led to land dispossession of indigenous peoples. An example of how the land grabbing is affecting indigenous peoples is illustrated through the situation faced by the Sengwer, an indigenous community of 33,187 members who have inhabited the Cherangany Hills in Kenya's Rift Valley for centuries. Since 2007, successive Kenyan governments have threatened the Sengwer communities in the Embobut forest with eviction. The pretext for the eviction is the claim made by the authorities that the indigenous Sengwer are allegedly responsible for the increasing degradation of the forest. In 2013 and 2014, the government accelerated its process of forced eviction. A deadline for residents to leave the forest expired in early January 2014, prompting the most recent spate of violence and forced evictions. The Forest Peoples Programme (FPP) reported that over a thousand homes had been torched by the government's Kenya Forest Service (KFS), aimed at forcibly evicting 15,000 Sengwer indigenous people from their ancestral homes in the Embobut forest and the Cherangany Hills.<sup>40</sup>

The reason behind the forced eviction shows that the pretext of environmental protection is in reality hiding a commercial venture. As noted in an article in the *Guardian*, a UK newspaper, published in July 2014: "Effectively, the government is permitting powerful logging companies to accelerate deforestation to buoy the Kenyan economy while systematically persecuting indigenous communities whose environmental impact is comparatively negligible."<sup>41</sup>

This notably involves co-optation between the government and a logging company but also shows longer plans to provide space for biofuel production. What the research demonstrates is that this eviction is part of the massive global investment to produce biofuels. The World Bank's Natural Resource Management Programme (NRMP) with the Kenyan government, launched in 2007, has involved funding for projects in the Cherangany Hills under the UN's Reducing Emissions from Deforestation and Forest Degradation (REDD) programme, including 'financing REDD+ readiness activities' some of which began in May 2013. It seems that the rush to evict the communities relates to such preparation for the REDD+ prospects.

Land grabbing has been facilitated by weak and inadequate land tenure legislation as well as a politically centralized and corrupt process.<sup>42</sup> Until very recently, the different post-independence governments of the country maintained the colonial model of 'trust land'. Under this notion of 'trust land', land that may belong to a community is held in trust by a county council on behalf of the local inhabitants as long as the land remains un-adjudicated or unregistered. Once it is allocated or registered, it becomes private land, belonging to the person/entity that holds the registration. Very often, these lands held in trust are actually lands on which indigenous peoples have lived for centuries. This notion of trust land has allowed the government to dispossess these communities by allocating their land to private interests, all in the name of the 'public interest'. Much of the land that has been leased to foreign companies or foreign investors (notably foreign states) is actually land that is inhabited and customarily-owned by indigenous peoples. As noted in an in-depth study on the situation of land grabbing in Kenya, led by the International Land Coalition (ILC) in 2011, land grabbing has been fuelled by the 'disappearance' of large tracts of public land and the enormous wealth accumulated by elite members of Kenyan society.<sup>43</sup> The study reveals that "these allocations involve processes that range from the questionable to the blatantly fraudulent or illegal; these processes depend on the type of land targeted. Recurring characteristics are the abuse of public office and the manipulation of legal processes to obtain or allocate public land for personal gain or to ensure political patronage".<sup>44</sup>

40 Forest Peoples Programme (2014) "Kenyan government's forced evictions threaten cultural survival of the Sengwer", FPP newsletter: 14 February, 2014.

41 Nafeez Ahmed (2014) "World Bank and UN carbon offset scheme 'complicit' in genocidal land grabs – NGOs Plight of Kenya's indigenous Sengwer shows carbon offsets are empowering corporate recolonisation of the South", *The Guardian*, 3 July 2014.

42 See: Kenya National Commission on Human Rights (2006), "Unjust enrichment: the making of land grabbing millionaires (Kenya National Commission on Human Rights; Kenya Land Alliance, 2006).

43 Erin O'Brien (2011) "Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon" (International Land Coalition, 2011).

44 Ibid., p. 1.





*The LAPSSET corridor project operates in land inhabited by pastoralists in northern Kenya. Photo: IWGIA archive*



*Pastoralists' houses burned down to make way for geothermal energy projects. Photo: IWGIA archive*

In terms of the legal framework, the adoption of a new constitution in 2010 marked an important turning point in terms of both land rights and indigenous peoples' rights. Article 63 guarantees the rights of communities to their lands and territories. It furthermore states that community land consists of land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and that it includes ancestral lands and lands traditionally occupied by hunter-gatherer communities. The new constitution thus re-categorizes land and offers a range of opportunities for supporting the local management of natural resources. Public Land is collectively owned and managed on behalf of the people by the National Land Commission. Community Land is a new category of land (replacing Trust Lands and Group Ranches). Community Land will also include ancestral lands and lands traditionally occupied by hunter-gatherer communities. Following on from this new constitutional framework regarding land rights, the National Land Commission Act was adopted in 2012 to establish a new National Land Commission. The Commission has a broad mandate which notably includes the design and recommendation of a national land policy to the government as well as advising the government on a comprehensive programme for the registration of land titles (both collective and individual) throughout the country. The Commission also has a mandate to initiate investigations, at its own initiative or following a complaint, into present or historical land injustices and recommend appropriate redress.<sup>45</sup>

After prolonged negotiations, the Community Land Act was enacted into law in September 2016. Under this new Act, communities can apply for formal titles as the Act recognizes customary land rights, including the customary right of occupancy. The Act makes it possible for communities to apply for formal land titles and get their customary community land rights recognized and registered. However, despite the many promises concerning community land claims, many indigenous communities have been disappointed by the restriction put within the Act which could result in denying them their fundamental rights to land and natural resources.<sup>46</sup> It notably fails to reconstitute indigenous peoples' lands and territories previously taken to create national parks and forest reserves.

Instead, it prescribes that community land previously used for a public purpose before the commencement of the Act automatically reverts to the national or county governments for the land to continue serving the public purpose it was serving.<sup>47</sup> Overall, the new Constitution and the new Community Land Act provide significant positive changes to a legal framework that allowed massive land grabbing in the period preceding the new Constitution. However, despite these progressive constitutional provisions and the establishment of the new Land Commission, indigenous peoples continue to suffer as a result of the State's lack of compliance with these provisions and with legal rulings on land issues. Recently, various indigenous groups such as the Endorois, Ogiek, Maasai and Sengwer witnessed first-hand the glaring back-handed treatment meted out to indigenous peoples in Kenya with regard to their rights to land and natural resources.

## 2.2. The 'great Asian land grab' and indigenous peoples

Land grabbing has also been dominating the headlines across Asia, where it has even been referred to as the 'Great Asian Land Grab'.<sup>48</sup> Many countries have been witnessing large-scale acquisitions of land by foreign investors. As noted by the International Food Policy Research Institute: "Ever since high food prices in 2007 and 2008 raised the prospect of food insecurity for countries without much farmland, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates (UAE) have scoured Asia for land."<sup>49</sup> Many countries with large indigenous populations have been the target of large-scale agribusiness investments across the region. For example, in 2009 in the Philippines alone, Bahrain secured 10,000 ha for agro-fishery, Qatar leased 100,000 ha, and an unknown company from China leased 1.24 million hectares.<sup>50</sup> This seems to be a common story across the region as countries in South-East Asia as well as South Asia are the targets of large-scale investment in land.

45 For full details of the Commission's mandate, see: <http://www.nlc.or.ke/about/mandate-overview/>

46 Under Section 13 (2) of the Community Land Act, 2016 "Any land which has been used communally, for public purpose, before the commencement of this Act shall upon commencement of this Act be deemed to be public land vested in the national or county Government, according to the use it was put for."

47 Section 13 (2) Community Land Act, 2016

48 Mike Eckel (2011), "The Great Asian Land Grab: How a World Bank program helped displace tens of thousands of urban poor", Foreign Policy, 13 May 2011.

49 See: IRIN, "ASIA: Land grabs threaten food security", 10 June 2009 (IRIN), available at: <http://www.irinnews.org/report/84785/asia-land-grabs-threaten-food-security>

50 See: "Bahrain and Philippines sign agricultural project agreement", Bahrain News Agency, 4 February 2009





*Adivasis in Jharkhand. Photo: Christian Erni*

In India, 461 ethnic groups are recognized as Scheduled Tribes, and these are considered to be India's indigenous peoples. In mainland India, the Scheduled Tribes are usually referred to as *Adivasis*, which literally means indigenous peoples. With an estimated population of 84.3 million, they comprise 8.2% of the total population. The largest concentrations of indigenous peoples are found in the seven states of north-east India, and the so-called 'central tribal belt' stretching from Rajasthan to West Bengal.

Land rights and access to land is a central concern for most communities, with 90% of the landless poor belonging to either the Scheduled Castes (Dalits) or Scheduled Tribes (indigenous peoples). Land dispossession in tribal areas across the country has been extremely high in recent years with an estimated 40-50% of displaced persons being indigenous peoples. The drivers of land grabbing in India mainly relate to so-called 'development projects' – dams, mining, natural resource extraction, ports, roads, and infrastructure projects, but also

the huge development of Special Economic Zones. The Central India Tribal Belt, which stretches from Gujarat in the west up to Assam in the east and encompasses the states of Madhya Pradesh, Chhattisgarh and Jharkhand, has been particularly affected by the large-scale acquisition of land for mining. While mining is not a new activity in the region, over the last few years the government has been acquiring large tracts of land for foreign investors under leasing arrangements. This is affecting indigenous peoples, who constitute a large majority of the rural populations in these states and who often find themselves on the land that is being leased to foreign companies.

One example of the correlation between foreign direct investment, large-scale land grabbing and government-forced evictions of local indigenous communities is the development of a massive steel plant, which is going to include iron ore mines, roads and railways, a captive port, a captive power plant, and an integrated township in Odisha. The project involves the South Korean Pohang Iron and Steel Company (POSCO). Worth approximately US\$12 billion, the POSCO-India project represents one of the largest single foreign direct investments in India to date, and it will require more than

51 This section is notably based on the paper presented by Gladson Dungdung, "Development over Dead Bodies" (IWGIA Seminar on Land Grabbing – October 2014).



*Adivasis in Jharkhand. Photo: Christian Erni*

12,000 acres of land, including approximately 4,000 acres for an integrated steel plant and captive port in an area that is home to forest-dwelling communities and a vibrant and sustainable local economy centred around betel leaf cultivation. In 2005, the Odisha government and POSCO signed a Memorandum of Understanding in which the government agreed to acquire and transfer to the company 4,004 acres of land for the construction of the steelworks project.<sup>52</sup> It is estimated that at least 22,000 people will be directly affected by the acquisition of land for this project. Many of these individuals belong to the local indigenous communities. There have been many reports of forced and violent evictions, as well as a total lack of consultation and compensation offered to the communities concerned.<sup>53</sup> This case is just one illustration of the massive increase in large-scale acquisitions of land aimed at allowing more foreign companies to develop mining industries in the region. It is also an illustration of the lack of legal protection and legal enforcement mechanisms for protecting indigenous peoples' land rights.

Over the years, India has developed a specific legal framework for the protection of the *Adivasis*. The whole legal edifice regarding indigenous peoples' rights in India is based on the Fifth and Sixth Schedules of the Constitution, which recognize indigenous peoples' rights to land and self-governance. However, it is only recently that the government has clearly put into law some of its ensuing obligations in terms of recognizing and protecting the indigenous communities' rights to land. This largely comes from the adoption in 2006 of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The Act notably guarantees the "Right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest-dwelling Scheduled Tribe or other traditional forest dwellers". The Act protects individuals' and communities' land rights in forested areas, and applies to two distinct groups of forest-dwelling people—members of Scheduled Tribes who primarily reside in and depend on the forest for their livelihood and "other traditional forest dwellers". Section 3(1) grants individuals and communities the right to "hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood"; the "right of ownership access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside

52 See: Memorandum of Understanding Between the Government of Orissa and POSCO for Establishment of an Integrated Steel Plant, 22 June 2005, available at <http://www.orissa.gov.in/posco/POSCO-MoU.htm>

53 See: International Human Rights Clinic, ESCR-Net, "The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project" (New York, NYU School of Law, 2013).





*Adivasis in Jharkhand. Photo: Christian Erni*

village boundaries”; and the “right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use”.

However, the Act establishes a complex and highly bureaucratic system of recognition. Section 6(1) of the Act provides that the Gram Sabha, or village assembly, shall initially pass a resolution recommending whose rights to which resources should be recognized. This resolution is then screened and approved at the level of the sub-division (or Taluka) and subsequently at the district level. The screening committee consists of three government officials (Forest, Revenue and Tribal Welfare departments) and three elected members of the local body at that level. While many hopes were raised with the adoption of the Forest Act, which promised indigenous communities recognition of their rights over land, many are thus now criticizing the Act for its lack of impact on their rights. There has been a general lack of willingness to implement the Act on the part of implementing bodies. One issue relates to the failure to process land claims under this Act. As noted in IWGIA's 2014 Yearbook, according to information available from the Ministry of Tribal Affairs, a total of 3,539,793 claims had been received across the country by 30 September 2013.<sup>54</sup> Of these, a total of 3,078,483 (86.96 % of

the total received) have been disposed of, out of which 1,406,971 titles (1,386,116 individual and 20,855 community titles) or 39.74 % were distributed and 1,671,512 claims (1,661,325 individual and 10,187 community titles) or 54.29 % were rejected. Eleven states, namely Uttarakhand, Bihar, Karnataka, Himachal Pradesh, Uttar Pradesh, West Bengal, Maharashtra, Madhya Pradesh, Chhattisgarh, Jharkhand and Assam had rejection rates of over 50 %.

The other important piece of legislation in the context of land grabbing comes from the very recent adoption of special legislation regarding compensation for land acquisition. In 2013, Parliament adopted the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR Act), which regulates land acquisition and provides rules for granting compensation, rehabilitation and resettlement to persons affected in India. This Act replaces the outdated and drastic Land Acquisition Act, which was adopted in 1894 during the British colonial era. This new Act establishes provisions to provide fair compensation to those whose land is taken away, brings transparency to the process of land acquisition and assures rehabilitation of those affected. The Act is applicable when:

<sup>54</sup> IWGIA (2014) *The Indigenous World 2014, India*; available at: <http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2014/IndiaIW2014.pdf>



- government acquires land for its own use, holding or control, including land for public sector undertakings.
- government acquires land with the ultimate purpose of transferring it to private companies for a stated public purpose. The purpose of LARR 2011 includes public-private partnership projects but excludes land acquired for state or national highway projects.
- government acquires land for immediate and declared use by private companies for a public purpose.

The LARR Act has special provisions for the Scheduled Tribes (STs) and Scheduled Castes. The Act does recognize that a 'land owner' can be a person who is granted forest rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 or under any other law currently in force. Article 41 states that: "As far as possible, no acquisition of land shall be made in the Scheduled Areas" and "Where such acquisition does take place it shall be done only as a demonstrable last resort" (paragraphs 1 and 2). Furthermore, it provides that in case of acquisition or alienation of land in the Scheduled Areas, the prior consent of the local governments concerned (Gram Sabha or the Panchayats or the autonomous District Councils) must be obtained in all cases.

In a land acquisition project that involves the involuntary displacement of Scheduled Castes or Scheduled Tribes, a development plan must be prepared including, among other things, the details of the procedure for selling land and a programme for developing alternatives for fuel, fodder and non-timber forest products on non-forest lands. The Act defines the procedures for paying compensation and provides that the affected families shall be resettled "preferably in the same Scheduled Area in a compact block so that they can retain their ethnic, linguistic and cultural identity" (paragraph 7). Furthermore, Article 41 includes a provision by which any alienation of lands belonging to members of the Scheduled Tribes and Scheduled Castes conducted in disregard of existing laws and regulations "shall be treated as null and void" (Article 9). It deals with fishing rights in hydroelectric project areas and additional compensation payments in case of resettlement outside the district. Article 42 ensures the continuation of reservation benefits for members of Scheduled Tribes and Scheduled Castes in the resettlement area and provides that families belonging to Scheduled Tribes who are residing in areas covered by the Fifth or Sixth Schedule to the Constitution and who are relocated outside those areas will continue to enjoy the "statutory safe-

guards, entitlements and benefits" in their resettlement areas regardless of whether the resettlement area is a Fifth or Sixth Schedule area or not. Finally, this article provides that any rights obtained by a community under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 "shall be quantified in monetary amount and be paid to the individual concerned who has been displaced due to the acquisition of land in proportion with his share in such community rights" (Article 3).

However, with the increased investments and acquisition of lands in favour of mining in the central region of India, in most situations these legal principles remain dead paper, not having any positive impact on indigenous communities who are usually facing forced removal with no compensation.

## Myanmar<sup>55</sup>

Myanmar is a diverse country encompassing over 100 different ethnic groups. Indigenous communities, referred to as 'ethnic nationalities', include the Shan, Karen, Rakhine, Karenni, Chin, Kachin and Mon, and they face discrimination, harassment and often violence. Many of these communities have been the victims of serious human rights violations as part of the government's oppression of ethnic nationalities. After decades of armed conflict, the military regime negotiated a series of ceasefire agreements in the early to mid-1990s.<sup>56</sup> While these resulted in the establishment of special regions with some degree of administrative autonomy, the agreements also allowed the military regime to progressively expand its presence and benefit from the unchecked exploitation of natural resources in ethnic areas. In this context, the government's policy of forced assimilation of the ethnic communities is being combined with widespread displacement.

The term 'land grabbing' has now become commonly associated with the large influx of foreign investment that is reaching Myanmar. While the ongoing reform process has raised hopes, it has also brought with it large investments from abroad. Joining the global land rush that followed the 2007 food and financial crisis, Myanmar has witnessed unprecedented flows of foreign investment into agribusiness, notably for rubber, palm oil and paddy rice.

55 The section is based on a presentation made by Naw Ei Ei Min, "Myanmar as newly open country to donors and foreign investment and possible impact on indigenous peoples' lands" – (IWGIA Seminar on Land Grabbing – October 2014).

56 Some of the ceasefires have now been broken. For updated information, see the most recent press releases on IWGIA's website.



*A village of the Kayan Kangan people in Kayah State. Land of neighboring communities has been grabbed by the army. Photo: Christian Erni*

The combination of very productive lands, a political landscape favouring foreign investors, and the international community's keen support for massive economic investments in the country has put Myanmar at the centre of the global land rush. To support such investments, a Foreign Investment Law was adopted in 2012 (Union Parliament Law No XXI) to support the entry of foreign direct investment into the country, especially in the natural resource extraction and agribusiness sectors. For example, the law ensures land-use rights up to 70 years for approved foreign investors. In the same year, the government also enacted the Special Economic Zone (SEZ) Law, which provides several incentives for foreign investors, including up to 75 years of land-use rights for large-scale industry, low-income tax rates, exemption from import duties for raw materials, machinery and equipment, no restriction on foreign shareholding, relaxed foreign exchange control, and government security support.<sup>57</sup>

These new land investments have failed to consult with local ethnic communities. The exploitation of natural resources in ethnic-controlled areas is at the heart of many conflicts in Myanmar. The people living in these

areas scarcely benefit from these operations. For example, following the ceasefire agreement signed between President Thein Sein's representatives and counterparts from the Karen National Union (KNU) in January 2012, dozens of business and development projects were triggered in eastern Myanmar. As highlighted in a 2013 report from the Karen Human Rights Group (KHRG), these projects began with displacement and land confiscation, without compensation or due process of the law.<sup>58</sup>

The vast majority of ethnic nationalities live in the most resource-rich areas of the country and depend on farmland and forests for their livelihoods. Most of them, however, have no formal title to their customary lands. The country has witnessed the adoption of several land-related laws which undermine yet further the recognition of indigenous communities' land rights. Under newly-passed laws, including the Farmland Law and the Vacant, Fallow and Virgin Lands Management Law, the State remains the ultimate owner of all land. The 2012 Farmland Law stipulates that land can be legally bought, sold and transferred on a land market with land-use certificates (LUCs). This implies the rejection of all forms of customary land usage and ownership rights for local communities. Moreover, this law stipulates that only the

57 Myanmar Special Economic Zones Law, the Pyidaungsu Hluttaw Law No. 1/2014 8th Waning of Pyatho, 1375 M.E 23rd January 2014. See: Aye Thidar Kyaw and Stuart Deed, "SPDC signs Special Economic Zone law into effect on Jan 27", Myanmar Times, 7-13 February 2011.

58 Karen Human Rights Group (2013), "Losing Ground: Land conflicts and collective action in eastern Myanmar".

Farmland Administration Body, which is chaired by the Ministry of Agriculture, can allocate farmland. This allows for the total political and centralized control of land allocation. The Vacant, Fallow and Virgin Lands Management Law (VFLV Law) legally allows the government to reallocate villagers' farm and forestlands to domestic and foreign investors. In practice, this law gives government the power to declare any land as "vacant, fallow and virgin land" open to foreign investors, even though such land might be used and customarily-owned by local ethnic communities.<sup>59</sup>

In this context, it is worth bearing in mind that many communities practise shifting cultivation throughout the country, a practice that involves land sharing and common land ownership. Under these new laws, which favour the holders of official individual land titles, most communities will lose their land rights. Community-managed resources, such as village forests, waterways, fishponds and grazing lands, are equally open to confiscation. As analysed in an in-depth study by the Transnational Institute: "The result from these two new land laws is that families and communities living in upland areas – now labelled 'wastelands' – have no legal land rights and land tenure security. This immediately puts ethnic upland communities under the real threat of losing their lands, which are precisely the areas heavily targeted by resource extraction and industrial agricultural concessions as well as infrastructure development."<sup>60</sup>

Land dispossession is therefore an increasing problem for the ethnic nationalities. With the growing interest in investing in Myanmar that has been facilitated by the passing of the Foreign Investment Law, threats to indigenous peoples' traditional lands and natural resources are likely to increase further. The legal landscape is quickly changing, as demonstrated by the new land and investment laws adopted in 2012, although constitutional reform may influence specialized legislation.

Overall, the combination of pro-foreign investment legislation, centralized and politically-controlled land legislation, and the rejection of specific protection for indigenous peoples all add up to a lethal combination for the future of indigenous communities' land rights in the country. The fact that Myanmar is also placed very high on the agenda of many agribusiness investors and their supportive financial institutions does not help matters.

59 The Vacant, Fallow and Virgin Lands Management Law (Pyidaungsu Hluttaw Law No. 10 of 2012) Day of 8th Waxing of Tagu 1373 ME (30th March, 2012)

60 "Access Denied: Land Rights and Ethnic Conflict in Burma" (Transnational Institute, Burma Policy Briefing Nr 11, May 2013).

## 2.3. Latin America, land grabbing and indigenous peoples

Many countries in Latin America have also been part of the global land rush. The FAO commissioned a regional study on the issue in 2011. The study, which examines the situation in 17 countries in the Latin American and the Caribbean region, shows that land grabbing is occurring in this region to a greater extent than previously assumed.<sup>61</sup> The hallmarks of the process in the region are quite similar to the ones driving the process globally, including agribusiness developments and high demand for the production of biofuels, but it seems that the production that has witnessed a remarkable surge in the last few years is linked to the rise of 'flex crops' particularly soya, oil palm and sugarcane, alongside land acquisitions for the expansion of industrial tree plantations and mega conservation projects.<sup>62</sup> However, as noted in several studies, the specific feature in this region seems to be that the animal feed (soya) component of these land grabs remains unparalleled anywhere else in the world.<sup>63</sup>

### Colombia<sup>64</sup>

Projections from the National Statistics Department for 2012 establish that the indigenous population numbers around 1,450,000 (or 3.5 % of the national population). With more than 87 different peoples and 65 different languages, Colombia is, after Brazil, one of the most ethnically diverse countries in the Americas. The indigenous peoples of Colombia live in such contrasting ecosystems as the Andes, the Amazon, the Pacific, the Eastern Plains and the desert peninsula of Guajira. Approximately one-third of the national territory is collectively owned by the indigenous peoples in the form of 'reserves'. Large parts of the indigenous territories are now being affected by oil and mining operations, along with plantations (banana, palm oil, and coca), all of which severely affect the lives of the indigenous communities.

61 Saturnino M. Borras Jr., Jennifer C. Franco, Cristobal Kay and Max Spoor (2011) "Land grabbing in Latin America and the Caribbean viewed from broader international perspectives" (FAO, 14 November 2011).

62 Ibid., p. 10.

63 See: Teubal, M. (2006) "Expansión del Modelo Sojero en la Argentina. De la Producción de Alimentos a los Commodities", Realidad Económica, No. 220.

64 This section builds on the presentation of Angel Áquileo Yagari Vélez, "Multi investment and peace process in Colombia" (IWGIA Seminar on Land Grabbing – October 2014).





*Indigenous peoples in Colombia. Photo: IWGIA archive*



In many ways, land grabbing is not a new issue in Colombia, as captured by Jonathan Glennie: "If you were to write a history of Colombia you could do worse than call it 'Land Grab'."<sup>65</sup> The history of the country has been dominated by a history of violent land dispossession, notably of the smallholder peasants, indigenous peoples and Afro-Colombians. The years of conflict that the country has witnessed have been instrumental in forcing indigenous people and Afro-Colombians from their land. Paramilitaries and criminal gangs have taken advantage of the conflict to take control of large swathes of land to mine for gold, explore oil reserves and establish palm oil plantations, often on indigenous territories. There are several reports highlighting how the forced displacement of indigenous and Afro-descendant communities due to the conflicts has resulted in their lands being acquired by land 'grabbers'. As noted by Mathilde Allain, in these situations: "(...) a real process of legalisation of dispossession takes place, where local administrations do not carry out the judicial measures taken against these illegal occupants. This dispossession goes further still in the cases where businesses which illegally occupy these lands file complaints for invasion on personal property against the native communities who have property titles over their territory".<sup>66</sup> In the current post-conflict situation, Colombia has been witnessing the increase in many political and economic incentives to develop agribusiness with a development discourse centred on global markets.<sup>67</sup> As a result, the country has seen very large increases in investment in the oil palm, sugar beet, sugarcane, soya, rice, corn and forestry industries. For example, while in 2001 at a national level there were 161,210 hectares of oil palm planted, in 2005 the figure had increased to 275,317 hectares; that is to say Colombia had undergone a 41.4% increase in just under four years, figures which make the country the chief producer in Latin America, and the fourth largest globally.<sup>68</sup>

Other figures highlight how Colombia has opened up to foreign investors. For example, Cargill, one of the world's largest agribusinesses, bought over 220,000 acres in the Colombian department of Meta, where it is

already producing grain. The Israeli company Merhav has invested US\$ 300 million in buying and preparing nearly 25,000 acres in Magdalena Medio for the production of sugar cane from which to produce ethanol. Over 280,000 acres have been sold to foreign companies for biofuel crop production, as well as nearly 250,000 acres of forest land that is now owned by Timberland Holdings (Swiss-Ecuadorian company), Smurfit-Kappa (Irish), the Chilean-based companies Agrícola de La Sierra and Reforestadora del Sinú, and the Colombian companies Inverbosques and Forest First.<sup>69</sup> It is also worth noting that, in 2011, Colombia signed Free Trade Agreements (FTAs) with the United States of America, Canada and Switzerland, thus opening the door to imported agricultural and food products, discouraging the reconstruction of the agricultural sector and increasing poverty in rural Colombia. Many indigenous and Afro-Colombian communities have been directly affected by the expansion of biofuel production. As analysed by Alvarez and Mondragón in 2007, the land struggles of indigenous, peasant and Afro-Colombian communities in the Cauca River Valley were linked to the expansion of sugarcane cultivation in the region.<sup>70</sup> While the government had promised to buy lands in Cauca province and give them to the indigenous communities in recognition of their territorial rights and as reparation for an indigenous massacre, these lands were then leased to the sugar/ethanol industry to expand sugarcane cultivation in the region.

In terms of the legal framework, Colombia undertook an important reform of its Constitution in 1991, with the aim notably of providing more recognition and protection of Colombia's ethnic diversity. As a result, the Constitution and its implementing legislation prohibit racial discrimination, and protect and promote equality. Following the new constitutional momentum, Act No. 160 of 1994 was adopted to recognize indigenous peoples' land rights. This law notably governs the rules regarding indigenous reservations. In terms of its international obligations, it is worth highlighting that Colombia has ratified ILO Convention 169, and the Inter-American Court of Human Rights has received several cases regarding indigenous peoples' rights in Colombia.

However, despite the development of specific land rights for indigenous peoples, there are many shortfalls in the implementation of this legal framework. Apart

65 Jonathan Glennie (2011) "Land grabs have dominated Colombia's history", *The Guardian* (UK), Monday 31 January 2011.

66 Mathilde Allain (2015) "Land Grabbing and Peace Negotiations in Colombia", July 2015, available at: <http://www.noria-research.com/land-grabbing-and-peace-negotiations-in-colombia/>

67 See: Grajales, J. (2013) "State Involvement, Land Grabbing and Counter-Insurgency in Colombia". *Development and Change*, 44: 211–232.

68 Mark James Maughan (2011) "Land Grab and Oil Palm in Colombia" (Land Deals Politics Initiative, 2011).

69 All these figures are from 2012: Nazih Richani, "Sovereignty For Sale: Corporate Land Grab in Colombia" (*Cuadernos Colombianos*, 10 April 2012).

70 P. Alvarez (2007) "Los agrocombustibles en boga: el caso del etanol en Colombia", *Revista Semillas*, 34/35, 44-51 (2007); H. Mondragón, "Cómo encadenaron a la madre tierra y a la gente en el Norte del Cauca", *Revista Semillas*, 34/35, 36-43 (2007).



from the general issue of violence against indigenous peoples, there is also a lack of implementation and respect for the rule of law when it comes to land rights.<sup>71</sup> There have been many cases regarding a lack of protection of indigenous peoples that have reached the level of the Constitutional Court in the past.<sup>72</sup> Moreover, the government recently undertook to make a number of amendments to Decrees 1987 of 2013 (agrarian pact) and 1465 of 2013 (special agrarian procedures to clarify ownership) aimed at legally protecting indigenous ancestral territories. These legal changes may directly affect indigenous peoples' rights to their land and territories. Moreover, with regard to land grabbing, in addition to recent legislation such as the law for the promotion of ethanol adopted in 2001 (Law 693 2001) and the 2004 law to promote biodiesel (Law 939 2004), the government has adopted several packages of incentives to support investment in agribusiness and biofuels.<sup>73</sup> The result of this increase in the production of biofuels has been the massive acquisition of land on which to plant palm oil and sugarcane. This has resulted in displacements, land disposessions, and the violent appropriation or misappropriation of land.

## Chile<sup>74</sup>

The population that self-identifies as belonging to or descended from one of the nine indigenous peoples recognized under Chilean law numbers 1,369,563 people, or 8 % of the country's total population.<sup>75</sup> The Mapuche, from the south, account for approximately 85 % of this number.

Land grabbing has been fuelled by the phenomenal increase in demand for meat and other animal products, as well as fruits and wines, which has in turn led to the expansion of lands for livestock and fruits and vineyards across Chile. Forestry, and particularly the acquisition of land on which to plant commercial trees such as pine and eucalyptus, is another large industry in Chile. A further sector that has created high demand for land has been the conservation and tourism sector, and notably the purchase of large tracts of land by private actors in the name of conservation.<sup>76</sup> Over the past 10 years, land purchases for conservation objectives — known as Privately Protected Areas (PPAs) — have emerged across Chile, now totalling around 1.6 million hectares and covering around 2 % of the country. Chile now has around 21% per cent of its total land area under private or State-managed conservation. One of the largest (and most controversial) individual land purchases was Doug Tompkins' 275,000 hectare PPA in the north of Chile (Tompkins also owns US-based recreational company North Face).<sup>77</sup> The land was acquired for conservation, as the aim was to establish a very large private protected area. However, in this process of land acquisition, the local populations' rights to land were not respected. This is only an example, as there have been other large-scale land purchases by private individuals done with the aim of conservation. In these cases, the land rights of the local populations have usually been undermined.<sup>78</sup>

The other 'industry' that has been significantly and negatively impacting the rights of indigenous peoples to their lands and natural resources relates to the increasing development of industrial tree plantations across the

71 For details, see: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur, UN Doc. A/HRC/12/34/Add.6 (2009).

72 See for example: Second Review, Chamber of the Colombian Constitutional Court, by means of Court Record N° 004 of January 26, 2009. For a review of all the major cases, see: Vermund Olsen, 'Legal framework for indigenous peoples' rights in Colombia' (HREV, 2008), available at: <http://hrev.org/wp-content/uploads/2011/02/tp2legalframework.pdf>

73 For details, see: Victoria Marin, Jon C. Lovett and Joy S. Clancy (2011) "Biofuels and Land Appropriation in Colombia: Do Biofuels National Policies Fuel Land Grabs?" (Paper presented at the International Conference on Global Land Grabbing 6-8 April 2011).

74 This section relies on information presented by Alfredo Segel, "Logging and fast growing tree plantations in Chile" – October 2014 (IWGIA Workshop on Land Grabbing).

75 See: Database from the National Socio-economic Survey (CASEN) 2011. Statistical projection made by the Civic Observatory team.

76 See: George Holmes (2014), "What is a land grab? Exploring green grabs, conservation, and private protected areas in southern Chile", *The Journal of Peasant Studies*, Vol. 41, Iss. 4, 2014.

77 See: IIED, "Land grabbing: is conservation part of the problem or the solution?", at: <http://pubs.iied.org/pdfs/17166IIED.pdf>

78 See: George Holmes (2014), "What is a land grab? Exploring green grabs, conservation, and private protected areas in southern Chile", *The Journal of Peasant Studies*, Vol. 41, Iss. 4, 2014.



*Pine and eucalyptus plantations in Mapuche traditional land. Photo: Rubén Sánchez*





*Pine and eucalyptus plantations in Mapuche traditional land. Photo: Rubén Sánchez*

country. Most of these tree plantations have been established on traditional Mapuche lands, mainly in the regions of Biobío, La Araucanía, Los Ríos and Los Lagos. In most situations, this has a direct impact on indigenous peoples' rights, as these tree plantations are established on lands which were usurped from the Mapuche both during the colonial era and following the military coup of 1973.<sup>79</sup>

In terms of the legal framework, Chile's constitution (which dates from 1980, during the time of the military dictatorship) still fails to recognize indigenous peoples and their rights. There have been years of negotiations to ensure a revision of the Constitution and its incorporation of indigenous peoples' rights but this process has thus far been unsuccessful. The main law concerning indigenous peoples' rights is Law No. 19,253 of 1993 on the "Promotion, protection and development of indigenous peoples".<sup>80</sup> However, this law is far from meeting the international legal standards on the rights of indigenous peoples. This lack of respect for and implementation of indigenous peoples' rights was recently illustrated with the adoption of specific decrees that directly affect indigenous peoples. For example, Supreme Decree

No. 124 of the Ministry of Planning expressly precludes consultations concerning investment projects. In 2013, the Ministry of Social Development approved the regulation governing indigenous consultation by means of Supreme Decree (SD) No. 66. Article 3 of the regulation establishes that the duty to consult shall be considered fulfilled when the body responsible has made the necessary efforts to reach an agreement or obtain the consent of the peoples affected, "even when it has not been possible to do so". Its Article 7 provides that only those legislative and administrative measures that "directly cause a significant and specific impact on indigenous peoples because of their status as such" shall be required to be put out to consultation. As noted in IWGIA's Yearbook, these two principles are in direct violation of ILO Convention 169, to which Chile is a state party and which states that indigenous peoples should be consulted on all administrative and legislative measures that are likely to directly affect them and that the aim of the consultation is to reach an agreement or obtain consent.<sup>81</sup>

Likewise, the regulation governing the environmental impact assessment system (SD No. 40), which contains rules governing the 'consultation' of indigenous

79 See: Nancy Yáñez, José Aylwin and Rubén Sanchez (2013), "Pueblo mapuche y recursos forestales en Chile: devastación y conservación en un contexto de globalización económica" (Observatorio Ciudadano & IWGIA, 2013)

80 Indigenous Law N° 19,253 of 1993.

81 See: IWGIA 2014 Yearbook, p. 203; available at: <http://www.iwgia.org/regions/latin-america/chile>

peoples with regard to investment projects that are subject to an environmental impact assessment (EIA), does not meet the minimum standards established in ILO 169. For example, this regulation limits the requirement for

prior consultation to high-impact projects and restricts consultation to cases that directly affect indigenous peoples, this being determined in advance by the authority.

## 2.4. Land grabbing in the Arctic and Siberia

The Arctic region has recently been labelled the 'new Eldorado' for being one of the richest regions in terms of future potential natural resource exploitation. The Arctic region is home to several groups of indigenous peoples, all of which are badly affected by the current wave of land grabbing on the part of private and public investors looking for land to be exploited. The following section focuses on the situation in Russia, where IWGIA's partner organization has been experiencing this process.

### Russia<sup>82</sup>



*Open cast mine in the immediate neighbourhood of Kazas. Photo: Nelly Tokmagasheva*

The Russian Federation is home to more than 100 ethnic groups. Of these, 41 are legally recognized as 'indigenous, small-numbered peoples of the North, Siberia and the Far East'; others are still striving to obtain this status, which is conditional upon a people having no more than 50,000 members, maintaining a traditional way of life, in-

habiting certain remote regions of Russia and identifying itself as a distinct ethnic community. A definition of 'indigenous' without the numerical qualification does not exist in Russian legislation. The small-numbered indigenous peoples number approximately 250,000 individuals and thus make up less than 0.2 % of Russia's population. They traditionally inhabit huge territories stretching from the Kola Peninsula in the west to the Bering Strait in the east, and covering around two-thirds of the Russian territory. Their territories are rich in natural resources, including oil, gas

<sup>82</sup> This section is based on the paper presented by Johannes Rohr, "Land Grabbing in Russia" – (IWGIA Seminar on Land Grabbing – October 2014)





*The coal mining company scared inhabitants of Kazas village into selling their houses far below market price and immediately had them demolished to make way for mining. Photo: Nelly Tokmagasheva*



and minerals, and they are heavily affected by large energy projects such as pipelines and hydroelectric dams.

Russia offers a different situation compared to other countries that are witnessing large-scale foreign investments as such investment is small in comparison with the domestic land grabbing that is taking place.<sup>83</sup> Russia has large 'land reserves' and huge potential for natural resource exploitation. The drive to use these lands and exploit the natural resources is being largely driven by Russian oligarchs rather than foreign investors. However, the rationale for such large-scale grabbing is similar to the arguments developed for the global land grab, as the common argument developed by the authorities to justify large-scale acquisitions of indigenous territories is that such lands are available, unpopulated and under-exploited. The land grab is largely driven by the ongoing expansion of industrial operations, mostly in the extractive industries. Indigenous peoples' territories are heavily affected by large energy projects such as pipelines and hydroelectric dams. One of the drivers of land grabbing and displacement is open cast mining with its high profitability and its insatiable appetite for land. It has converted indigenous peoples' ancestral lands in regions such as the Kuzbass into lunar landscapes and subjected indigenous communities to chain displacements. Since the 1970s, some indigenous communities saw themselves forcibly relocated several times over for which they have never been compensated. Today, the pressure to relocate is mounting on the last intact majority indigenous settlements. Much of the coal from the Kuzbass region is being exported to Europe.

The current land grabbing is supported by the land reforms that have taken place since the early 1990s and which bear witness to the increased legalization of large private properties.<sup>84</sup> The main change came with the new 2001 Land Code as well as the 2003 Agricultural Land Transactions Law, which allows for the sale of large plots of private land. This opened up the possibility of large tracts of land being purchased by investors. It is still illegal to sell land to foreigners but foreign investors often operate through their Russian subsidiaries, thus enabling them to buy land. Land grabbing is expanding at a rapid pace and, in some cases, resulting in dispossession and little or no compensation.

In theory, there is a legal framework in place to protect indigenous peoples' land rights. Three main federal

laws are relevant to indigenous peoples' rights, the law "On Guarantees of the Rights of Indigenous Small-numbered Peoples of the Russian Federation"; the law "On General Principles of the Organisation of Communities [obshchinas] of Indigenous Small-numbered Peoples of the North, Siberia and Far East of the Russian Federation"; and the law "On Territories of Traditional Nature Use of Small-numbered Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation". However, despite this legal framework, in reality indigenous peoples' land rights are rarely recognized or protected. This is due to poor implementation but also to fundamentally contradictory legal provisions. The Land Code, in particular, contradicts many of the guarantees proclaimed in the laws regarding indigenous peoples' rights. For example, as noted in a recent report commissioned by the World Bank: "There is a lack of congruence among the Russian Federation laws with regard to how land and tenure are established."<sup>85</sup> The report further notes that, overall, the Land Code, Forestry Code and Water Code do not limit tenders and auctions of land, forest and water areas in territories where indigenous peoples live and for the natural resources they use. In practice, this means that the little protection offered to indigenous peoples by the law can be undermined at any time by the provisions defined in the natural resource legislation such as the forest, water, fishing, hunting or land codes.

In practice, it is still fairly common for Russian oil companies to enter indigenous peoples' territories without any consultation, consent or even information provision to the affected communities. Reports from Komi Republic in 2014 revealed that the long-distance "Azeska – Irayol" pipeline, cutting through the territory of the Izvatas people, had been built without real consultation. Villagers from Shelyayur reported how oil wells had been set up literally on the edge of the village without the knowledge of the local population. In both cases, the company was under an obligation to hold public hearings as part of the approval process but the hearings were held in a remote location and were not announced to those affected. Such mock hearings are a common strategy practised by many extractive companies. Their protocols often fail to reflect objections expressed during the hearing and indicate consent and agreement where there was none. More generally, the political environment in Russia is not currently conducive to supporting the rights of indigenous peoples and the latest developments show no signs of Russia increasing its consideration of indigenous rights during the planning and execution of oil and gas-related projects.

85 World Bank. 2014. Indigenous peoples of Russia: country profile. Washington, DC: World Bank Group.

83 See: Oane Visser and Natalya Mamonova (2012), "Large-scale land acquisitions in the former Soviet Union: A study of rural social movements and land conflicts" (IS Land Academy report, 2012).

84 See: O. Visser, N. Mamonova and M. Spoor (2012), "Oligarchs, megafarms and land reserves. Understanding land grabbing in Russia", *The Journal of Peasant Studies*, vol. 39, 2012.

## SECTION 3: INTERNATIONAL & REGIONAL LEGAL FRAMEWORK(S)

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One of the complexities of the international legal framework applicable to land grabbing relates to the fact that several parts of international law are relevant. Large-scale land grabbing directly affects indigenous peoples' human rights as guaranteed under international human rights law but also touches upon legal issues that fall under international investment or environmental law. While the international human rights framework is certainly essential for challenging land grabbing, other parts of international law also need to be included in order to offer a comprehensive approach to the issue of land grabbing. The following analysis examines land grabbing in the context of (1) International Human Rights Law; (2) Business, Human Rights and International Investment Law; (3) International Environmental Law; and (4) Soft Law Initiatives on Land Rights and Land Tenure. This overview is not exhaustive, as the aim is to provide a general synopsis of the main areas of law that are relevant to land grabbing without entering into the details of each area of the law. The references given throughout this section may, however, provide guidance towards more specialized sources on these specific areas of law.

### 3.1. International human rights law

Land grabbing directly affects many of the human rights of indigenous peoples, ranging from their right to land to their cultural and spiritual rights. This protection is based on a number of interrelated human rights protected by international law, including the right to property, food, culture, housing, self-determination, non-discrimination and development. From this perspective, the whole international human rights framework developed for the protection of indigenous peoples' rights is relevant. As such, the following analysis does not undertake a detailed review of the indigenous peoples' rights that are relevant to the context of land grabbing but rather provides a snapshot of some of the most relevant rights in the particular context of land grabbing. In so doing, the aim is also to focus on some of the general human rights applicable to all rather than the specific human rights devoted to indigenous peoples. Human rights law does not specifically address land grabbing but does offer several avenues by which to ensure that individuals, peoples and communities do have their

fundamental rights to food, water and housing respected, protected and promoted.

### General human rights law

#### The right to food

The right to food is strongly affirmed under international human rights law. Article 25 of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to an adequate standard of living, "including food". Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) makes special reference to the right to food by expressly affirming the right of everyone to an adequate standard of living "including adequate food". Article 11(2) proclaims the "fundamental right of everyone to be free from hunger", and requires States "to improve methods of production, conservation and distribution of food", in particular reforming agrarian systems in order to achieve the most efficient use of natural resources; Article 11(2)(b) requires the implementation of "an equitable distribution of world food supplies".

Several references to land rights can be found in General Comment 12 of the Committee on Economic, Social and Cultural Rights on the right to food. In its General Comment, the Committee stated: "The right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement."<sup>86</sup> In considering that the "roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food", General Comment 12 on the right to adequate food states that availability "refers to the possibilities either for feeding oneself directly from productive land or other natural resources", or from functioning market systems that make food available. The General Comment further states that ensuring access to "food or resources for food" requires States to implement full and equal access to economic resources, including

<sup>86</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.



the right to inheritance and ownership of land, for all people, and particularly for women.

The connection between land rights and the right to food has been specifically exposed in the context of land grabbing. The former UN Special Rapporteur on the Right to Food, Olivier De Schutter, has directly connected the right to food with the question of large-scale land acquisitions by highlighting that:

“The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local small-holders were to fall following the arrival on domestic markets of cheaply-priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor”.<sup>87</sup>

Going further, the Special Rapporteur’s analysis invites all stakeholders (governments, investors and local communities) to adopt a more structured approach that places human rights standards at the centre of negotiations. The Special Rapporteur has proposed 11 minimum principles relating to the right to food, which are addressed to investors, home states, host states, local peoples, indigenous peoples and civil society. Two of the proposed principles are directly concerned with land rights:

3.1. Transfer of land-use or ownership can only take place with the free, prior and informed consent of the local communities. This is particularly relevant to indigenous communities given their historical experience of dispossession.

3.2. States should adopt legislation protecting land rights including individual titles or collective registration of land use in order to ensure full judicial protection.

As part of the ongoing pressure for lands to produce food, the Special Rapporteur has stated that in order to protect the right to food of the most destitute, States should ensure local communities’ security of land tenure (including indigenous peoples) and put in place policies aimed at ensuring more equitable access to land. In the overall global

rush for land, it may be important to further highlight this connection between the right to food and land rights for indigenous peoples.

## The right to water

The right to water can also represent an important legal framework in the context of land grabs. Very often, land grabbing also involves ‘water grabbing’ as the businesses that are developed on the land for food or biofuel production are very often highly demanding of water sources. In 2010, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation were essential to the realization of all human rights.<sup>88</sup>

A good illustration of the relevance of the right to water in the context of grabbing indigenous peoples’ land is the decision of the Human Rights Committee (HRC) in the case of *Ángela Poma Poma v. Peru*. This case concerns water restrictions suffered by an indigenous community of llama herders who lost a significant share of their water following developmental projects undertaken by the government. The community challenged this loss of access to water as it greatly affected their livelihoods by not allowing them to graze and herd their llamas. The HRC examined the case from an angle of cultural rights for minorities as protected under Article 27 of the ICCPR based on the fact that the loss of access to water affected the right of the community to practise a traditional activity essential to their culture. The view of the Committee was that if a decision, and this includes allocation of water, substantively compromises the way of life and culture of a minority and indigenous community then this community should be consulted and should provide its free, prior and informed consent before any decision is made. The Committee affirmed that “...participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.”<sup>89</sup>

Overall, the right to water is now strongly affirmed both as a stand-alone right and also as part of other fundamental rights such as the rights to health and life. While there is still very little jurisprudence on the issue, it is certain that, with the increased global quest for remaining sources of fresh water, ever more cases and decisions will focus on the right to water.

<sup>87</sup> Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, “Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge”, UN Doc. A/HRC/33/13/Add.2., para. 4.

<sup>88</sup> Resolution adopted by the General Assembly: The Human Right to Water and Sanitation, UN Doc. A/RES /64/292 (3 August 2010).

<sup>89</sup> Human Rights Committee, Communication No. 1457/2006, *Ángela Poma Poma v. Peru*, 24 April 2006, UN Doc. CCPR/C/95/D/1457/2006 (2006).

## The right to adequate housing

The right to housing is enshrined in several key international human rights instruments. This includes the ICESCR (Art. 11, para. 1), the Convention on the Rights of the Child (CRC) (Art. 27, para. 3), and the non-discrimination provisions found in Article 14, paragraph 2 (h) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Article 5 (e) of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Article 25 of the UDHR includes the right to housing as part of the broader right to an adequate standard of living. Hence, the right to housing is often qualified as a right to 'adequate' housing.

The Committee on Economic, Social and Cultural Rights (hereinafter the CESCR) has devoted a large part of its work to the right to adequate housing. In its General Comment No. 4 on the right to adequate housing, the CESCR highlighted that "while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors", there are nonetheless some key universal factors to determine the content of such right. The Committee has identified seven common factors, the first one being the legal security of tenure. While security of tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, it also refers to security of rights over land.

The Committee has notably focused on the situation of landless persons, highlighting how the lack of access to land fundamentally impinges on the realization of their right to adequate housing. The CESCR noted that "discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement".<sup>90</sup> The Committee added that "[W]ithin many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal" (para. 8 (e)). This approach highlights how the realization of the right to adequate housing necessarily implies a government guarantee of both access to land and security of land tenure for the landless.

The focus on security of tenure and access to land as essential elements of the right to adequate housing is also a central feature in the work of the UN Special Rapporteur on adequate housing. Miloon Kothari, the former UN Special Rapporteur, has particularly put great emphasis on the importance of recognizing that land rights constitute a

central aspect of the right to housing. The Special Rapporteur has identified land rights as the normative gap within international human rights when it comes to the protection of the right to adequate housing. As noted in the 2007 report: "Throughout his work, the Special Rapporteur has tried to identify elements that positively or negatively affect the realization of the right to adequate housing. Land as an entitlement is often an essential element necessary to understand the degree of violation and the extent of realization of the right to adequate housing."<sup>91</sup>

Overall, the connection between housing and land rights is a strong feature of human rights law, and it involves both a positive and a negative aspect. It has a positive aspect in the sense that land rights are considered to be an essential element for achieving the right to housing and a negative aspect as land dispossession could qualify as forced eviction, in direct violation of the right to housing. Housing and land rights have also been inter-connected in the human rights approach to forced eviction. General Comment No. 7 of the CESCR defines forced eviction as the "permanent or temporary removal against the will of individuals, families or communities from their homes or land, which they occupy, without the provision of, and access to, appropriate forms of legal or other protection". Forced evictions are often linked to the absence of legally secure tenure, which constitutes an essential element of the right to adequate housing. Forced evictions are *prima facie* violations of the human right to adequate housing.

## Protection from forced eviction

Both the UN Comprehensive Human Rights Guidelines on Development-based Displacement and the Basic Principles and Guidelines on Development-based Evictions and Displacement adopt a similar definition of forced eviction, which includes loss of lands.<sup>92</sup> Forced evictions are defined as the involuntary removal of individuals, families or communities from the homes or land which they occupy, without appropriate legal protections. Under international law, forced evictions are considered "a gross violation of human rights" that "can only be justified in the most

<sup>90</sup> The right to adequate housing (Art.11 (1)), CESCR General comment 4. (General Comments).

<sup>91</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/4/18 (5 February 2007), at para. 25

<sup>92</sup> Basic principles and guidelines on development-based evictions and displacement contained in Annex I to the report of the Special Rapporteur, UN Doc. A/HRC/4/18 (2007). The basic principles and guidelines on development-based evictions and displacement represent a further development of the United Nations Comprehensive Human Rights Guidelines on Development-based Displacement (E/CN.4/Sub.2/1997/7, annex).

exceptional circumstances”, and only then if they comply with specific standards.<sup>93</sup>

While international human rights law does recognize that States have the power and right to forcibly evict people in the name of public interest (for example the building of infrastructure), this power is not absolute and should ensure that the concerned persons receive fair and just compensation. Failure to respect the human rights of the evicted person is recognized as constituting a violation of human rights. International human rights law requires that, to be legal, an eviction should only occur under exceptional circumstances and respect specific legal processes. Based on several regional human rights cases, it is now understood that State restrictions on the use and enjoyment of community land rights must be: (1) previously established by the law; (2) necessary; (3) proportionate; and (4) aim to achieve a legitimate objective in a democratic society.

The connection between forced eviction and violation of land rights played an important role in the decision of the African Commission on Human and Peoples' Rights (ACHPR) in the case of the Endorois community v. Kenya. The Commission highlighted how the non-recognition of and failure to respect the land rights of the indigenous community in their displacement led to their forced eviction, in violation of Article 14 of the African Charter on Human and Peoples' Rights.<sup>94</sup> In reaching such a decision, the Commission made direct reference to standards outlined by the UN CESCR in its General Comment 4 on the right to housing and General Comment 7 on evictions and the right to housing, highlighting how land rights are directly related to both the right to housing and the prohibition of forced evictions.

## Indigenous peoples' specific rights

### Land rights

The other relevant part of international human rights comes from the protection of land rights for indigenous peoples. An important aspect of international human rights law is to highlight that indigenous peoples' land rights need to be recognized and protected by their own governments.

<sup>93</sup> Ibid.

<sup>94</sup> African Commission on Human and Peoples' Rights, Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v. Kenya (decision of Feb., 2010), see para. 200.

Most indigenous communities' land tenure systems rely on ancestral customary land rights. However, many legal systems do not properly recognize these customary rights or, when they do, these rights are considered as less important than other recognized rights. In the context of land grabbing, this has often been understood by governments as meaning that the land is empty, unoccupied, or under State ownership. International human rights law clearly establishes that States need to recognize indigenous peoples' land rights even when these are not formally recognized by the administration.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) devotes several of its articles to land rights, making this an essential human rights issue for indigenous peoples. Article 25 of the Declaration affirms that: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." Likewise, International Labour Convention No. 169 on the Rights of Indigenous and Tribal Peoples also includes a human rights-based approach to land rights. ILO Convention No. 169 notably affirms that, in applying the Convention, "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship". Both the UN Charter and treaty-based international human rights bodies have affirmed this approach, highlighting that land rights are a strong component of indigenous peoples' rights under international law. In recent years, both the Inter-American Court of and Commission on Human Rights and the African Commission on Human and Peoples' Rights have developed very strong jurisprudence on this issue. Both regional systems have notably highlighted the following key principles:

1. Traditional possession of lands by indigenous and tribal peoples has equivalent legal effect to that of a State-granted property title;
2. Traditional possession entitles indigenous and tribal peoples to demand official recognition, demarcation and registration of their ownership right;
3. Members of indigenous and tribal peoples who have unwillingly left or lost possession of their traditional lands maintain property rights to their lands, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and



4. Members of indigenous and tribal peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to get their lands back (restitution) or to obtain other lands of equal size and quality.<sup>95</sup>

### **The Right to Free, Prior and Informed Consent**

The other crucial right protected under international human rights law in the context of land grabbing is the right to free, prior and informed consent (FPIC). The UNDRIP puts great emphasis on the right to FPIC for indigenous peoples, especially in the context of development.<sup>96</sup> It implies a process of consultation, which has to be free from manipulation and coercion, respect traditional decision-making processes, and be held sufficiently in advance of project execution with adequate information provided to enable informed decisions to be taken.<sup>97</sup> FPIC is probably one of the most relevant rights in the context of land grabbing as, in most situations, the lease of lands between investors, corporations and governments takes place without any consultation of the local indigenous communities.

In the context of the global land rush, it is important to highlight that FPIC is not a privilege that is sometimes given to communities: it is a right with which governments and project proponents are required to comply. This argument is important as, in many situations, governments resist the implementation of FPIC based on the argument that indigenous peoples should not have a privilege. It is also worth noting that FPIC is increasingly recognized in international voluntary industry standards, which are rules that companies voluntarily agree to comply with so that their activities meet consumer expectations on human rights and sustainability.

Regarding indigenous peoples' specific rights, it is also worth noting the current process of drafting a United

Nations Declaration on the rights of peasants and other people working in rural areas. This process is now well underway in the UN as, in 2010, the Human Rights Council mandated the Advisory Committee to undertake a preliminary study on ways and means of further advancing the rights of people working in rural areas, including women, in particular smallholders engaged in the production of food and/or other agricultural products. In 2011 and 2012, the Advisory Committee submitted two studies, in accordance with relevant Human Rights Council resolutions. In September 2012, the Human Rights Council adopted the resolution to establish an open-ended intergovernmental working group on the rights of peasants and other people working in rural areas, on the basis of the draft submitted by the Advisory Committee. The current draft mentions the particular situation of indigenous peasants.<sup>98</sup>

### **3.2 Business, investments, and human rights**

As highlighted earlier on, most of the land grabbing is being undertaken by the private sector, corporations and investors, with the support of governments. Over the last 10 years, the UN Human Rights System has been focusing a great deal of attention on the relationship between business and human rights. This has involved different initiatives, including the development of a set of guiding principles on business and human rights and the establishment of a working group on the issue. The former UN Special Rapporteur on the rights of indigenous peoples also dedicated a specific report to the issue of extractives industries and indigenous peoples.<sup>99</sup> Apart from corporations, the other important actors are investors and, as such, the law governing investments and its relationship with indigenous peoples' human rights also represents an important aspect of the relevant legal framework in the area of land grabbing.

### **Business and human rights**

At the international level, a leading initiative in this area is the work conducted under the leadership of Professor John Ruggie, the United Nations Secretary-General's Special Representative on Business and Human Rights. Ruggie proposed a UN framework on business and hu-

95 See: Janet Pritchard, Feja Lesniewska, Tom Lomax, Saskia Ozinga and Cynthia Morel (2013), "Securing community land and resource rights in Africa: A guide to legal reform and best practices", (FERN, FPP, ClientEarth and CED, December 2013), p. 26.

96 UN Declaration, Article 32.2 states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

97 Marcus Colchester and Maurizio Farhan Ferrari (2007), "Making Free, Prior and Informed Consent Work: Challenges and Prospects for Indigenous Peoples", (Forest Peoples Programme, Moreton-in-Marsh, 2007).

98 The draft is available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/A-HRC-WG-15-1-2\\_En.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/A-HRC-WG-15-1-2_En.pdf)

99 Report A/HRC/24/41, Extractive industries and indigenous peoples. Report of the Special Rapporteur on the rights of indigenous peoples.

man rights, which has been adopted by the UN mechanisms. The UN 'Protect, Respect, Remedy' framework is made up of three pillars:

- the State's duty to protect against human rights abuses by third parties, including business;
- the corporate responsibility to respect human rights, which means avoiding infringements of the rights of others;
- greater access of victims to effective remedy, judicial and non-judicial.

The Framework is based on the argument that international human rights standards are not binding on corporations as such but that, nevertheless, States are under an international obligation to ensure that corporations do not violate fundamental human rights when operating domestically or abroad (Protect). Additionally, corporations themselves must respect human rights, despite not being under an internationally-based duty to do so, which means acting with due diligence in order to avoid infringing the rights of others, and addressing any harm that does occur (Respect). Finally, both States and companies must ensure that effective grievance mechanisms, both judicial and non-judicial, are available for victims of abuse (Remedy).

The Human Rights Council unanimously approved the Framework in 2008 and extended the Special Representative's mandate until 2011 with the task of 'operationalizing' and 'promoting' the Framework. As part of this effort, the Special Representative has notably developed a set of 'Guiding Principles on Business and Human Rights' for the implementation of his 'Protect, Respect, Remedy' framework, which were formally endorsed by the Human Rights Council in June 2011. Overall, however, both the framework and the guiding principles remain extremely vague and weak with regard to both indigenous peoples' rights and land rights. Generally, the Framework and the Guiding Principles establish broad standards that lack any specific focus on or mention of indigenous peoples' rights despite the impact of corporations on these rights. In the context of land grabbing and indigenous peoples, it is worth noting that the framework and the guiding principles do not refer either to land grabbing or to indigenous peoples. These principles could nonetheless present some opportunities for supporting indigenous peoples' rights in the context of business responsibilities and States' obligations to control the actions of companies. Moreover, it should be noted that, in June 2014, the Human Rights Council adopted a resolution calling for the development of a binding treaty on corporate responsibility in the area of human rights. This could provide a great opportunity

for influencing the development of legal obligations in this area.

### Business and financial initiatives

A large part of the human rights and business agenda relies on the role of business itself. Many corporations, but also financial institutions and investors, have started to adopt their own voluntary codes of practice and other benchmarks to address human rights. These initiatives are driven at the operational level of corporations but also at a macro level, as industry initiatives, and even by more global oversight mechanisms such as the UN Global Compact.<sup>100</sup> To some extent, all these initiatives are relevant in the context of land grabbing as these voluntary initiatives increasingly include some form of social and environmental impact assessment.

An important aspect of the increased focus on human rights in the context of private businesses and their operations relates to the multiplication of voluntary industry standards. While these standards are totally voluntary and generally left to the monitoring of the corporations themselves, some of these initiatives, and notably the sectoral initiatives, are directly relevant to the issue of land grabbing. Probably the most relevant of these in terms of their potential impact on land grabbing are the Forest Stewardship Council (FSC) for the sustainable production of wood and paper, the Round Table for Sustainable Palm Oil (RSPO) and the Round Table on Responsible Soy (RTRS). These are all industry-led initiatives to establish certification schemes that will ensure that production follows commonly agreed environmental and social standards. For example, if a palm oil company decides to become a member of the RSPO, it must comply with the standards contained in the RSPO Principles and Criteria. All these schemes are voluntary, however, and therefore cannot be legally enforced, although this can to some extent be encouraged by governments and also often offers potential avenues for mediation or for making complaints to the Ombudsman or related institutions.<sup>101</sup>

The financial sector has some corporate commitment instruments that could potentially be relevant to land is-

100 The UN Global Compact is a principle-based framework for businesses, stating ten principles in the areas of human rights, labour, the environment and anti-corruption. See: <https://www.unglobalcompact.org>

101 For a detailed analysis of all these initiatives, see: S. Heri, E. Bürgi Bonanomi, K. Gehne, A. Ten Kate and S. van der Wal (2011), "International instruments influencing the rights of people facing investments in agricultural land" (SOMO/Oxfam Novib/IL, January 2011).

sues. The first is the Equator Principles (EPs). In total, 68 financial institutions from 27 countries have signed up to the EPs, which in practice means that, for specific project finance loans, they promise to live up to a number of standards, mainly those of the International Finance Corporation (IFC), the private sector arm of the World Bank. A number of State-controlled banks and agencies benchmark projects against the Performance Standards of the International Finance Corporation (IFC, part of the World Bank Group).<sup>102</sup> The IFC performance standards state that, for projects with significant adverse impacts on affected communities, the process should ensure their free, prior and informed consultation (though not necessarily consent). A mechanism also needs to be established for concerns and grievances raised by individuals or groups from among communities affected by such projects.

It is worth noting that a significant part of the investments come from the financial development institutions. Many of the large-scale investments in agriculture and bio-fuels are driven by the investment of semi-public investors such as, for example, development finance institutions.<sup>103</sup> In recent years, these institutions have largely invested in the agriculture sector in the form of agriculture funds or investments in equity. By channelling finance into private equity, investments, hedge funds or funds-of-funds to the private sector and supporting investments in agribusiness, these public development institutions are directly involved in supporting projects that can result in land grabbing.<sup>104</sup> These institutions have very weak internal guidelines and oversight mechanisms. One of the conclusions drawn by Ten Kate and van der Wal in their detailed analysis of all these initiatives is that overall financial sector-specific instruments are too vague to be effective, Corporate Social Responsibility is too reliant on corporations' goodwill and, in general, all these initiatives - which are voluntary - do not specifically address land rights and lack any form of teeth to be implemented.<sup>105</sup>

Regarding the business and human rights framework, it is also worth noting the recent initiative on the extraterritorial obligations of States when it comes to human

rights provisions. The notion of extraterritoriality is extremely important in this context, as it means that States should apply the same human rights standards they apply to nationals living in their territory (including corporations) to those operating abroad. This notion of extraterritorial obligation could then have an important impact on the responsibilities of States to impose human rights obligations on companies acting abroad. From this perspective, the recent adoption of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights could represent an important step in the right direction. These principles were adopted at a gathering convened by Maastricht University and the International Commission of Jurists, a group of experts in international law and human rights, in 2011. The Maastricht Principles clarify the human rights obligations of States beyond their own borders in the area of economic, social and cultural rights. This set of principles represents an important review and affirmation of the States' obligation, notably, to guarantee that the human rights obligations they have signed up to in the area of economic, social and cultural rights are not violated by their own citizens (including corporations and investors) abroad. As such, this represents an important legal document despite the fact that it has not yet been formally endorsed within the international legal framework.

### International investment law

Increasingly, NGOs and other civil society organizations have started to realize that using the investor-state arbitration mechanisms may be one of the most relevant ways of accessing some forms of legal remedy. Investor-state arbitration settles disputes between an investor and a host state using an international arbitral tribunal. These are very efficient tribunals which, compared to other international mechanisms, receive a very high level of implementation from both States and investors.

The relevance in the context of land grabbing revolves around the fact that one of the main drivers of the current land rush is investment. It is not possible to quantify accurately the number of bilateral or international investment treaties or agreements signed regarding land investments but it is certain that there are many. Most of these investment agreements incorporate some form of remedial mechanism to allow investors to take disputes to arbitration. While, in the past, these mechanisms were mainly used by investors to protect their own investments, over the past 10 years, civil society organizations have started to become involved in investor-state arbitration proceedings in order to highlight the need to include public inter-

102 This includes 32 export credit agencies from the OECD, the Multilateral Investment Guarantee Agency (MIGA), European Development Financial Institutions (EDFIs) and, to a large extent, also the European Bank for Reconstruction and Development.

103 Development finance institutions are specialized development banks that are usually majority-owned by national governments.

104 See: APRODEV, "Policy Brief: The Role of European Development Finance Institutions in Land Grabs", May 2013.

105 A. Ten Kate and S. van der Wal (2011), 'Company commitment instruments to safeguard the food/land rights of people facing land use shifts', in S. Heri, E. Bürgi Bonanomi, K. Gehne, A. Ten Kate and S. van der Wal, "International instruments influencing the rights of people facing investments in agricultural land" (SOMO/Oxfam Novib/IL, January 2011).



est factors in these natural resource investments. Under these mechanisms, there could be scope to challenge some of the investment treaties that are directly resulting in indigenous peoples' loss of lands and access to natural resources.

### 3.3 International environmental law

Another area of international law that is increasingly relevant in the context of land grabbing and peoples' rights is international environmental law. While environmental law is generally more concerned with protecting the natural environment (sometimes to the detriment of the rights of indigenous peoples), there are ever more synergies between human rights and environmental protection in general. Recent developments concerning the implementation of the Convention on Biological Diversity (CBD) are relevant in the context of land grabbing. Even though there are some issues regarding the fact that the Convention refers to indigenous and local communities rather than indigenous peoples and local communities,<sup>106</sup> the CBD could offer a place in which to challenge land grabbing.

Recognizing the importance of indigenous peoples' traditional knowledge and sustainable practices, the CBD stipulates that States Parties should respect, preserve and maintain the knowledge, innovations and practices of indigenous communities that embody traditional lifestyles relevant to the conservation and sustainable use of biological diversity (Article 8(j)) and protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (Article 10(c)).

The Akwé: Kon Voluntary guidelines adopted in 2004 by the 7th Conference of the Parties to the UN Convention on Biological Diversity also puts forward the idea that States must ensure that no concession is issued over a people's lands and territories unless and until independent and technically capable organizations have performed a prior environmental and social impact assessment, supervised by the State. These voluntary guiding principles specifically concern the conducting of cultural, environmental and social impact assessments for developments proposed to take place on, or which are likely to affect, sacred sites or on lands and waters traditionally occupied or used by indigenous and local communities.

### 3.4 Guidance on land rights

Over the last few years, there has been an avalanche of initiatives and guidance issued by international and civil society organizations. For example, several international agencies, such as UN Habitat or the UN Global Land Tool Network, have highlighted how land rights are directly impacting access to food and shelter and how, in return, landlessness is a strong predictor of poverty and hunger.<sup>107</sup> While these guidelines and other similar initiatives do not have the full force of the law, as they are voluntary guidelines rather than binding treaties, they nonetheless represent an important aspect in the evolution of international law on the issue. The following overview focuses only on some of the most directly relevant initiatives regarding land grabbing.

#### **Voluntary Guidelines (VGs) on the Responsible Governance of Tenure of Land, Fisheries and Forests**

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security were developed under the leadership of the FAO. While they are non-binding in nature, they have been exposed to widespread consultation and review by both State and non-State actors alike. More than 100 member countries of the UN's Committee on World Food Security have endorsed the Guidelines, adopted in May 2012. The Guidelines provide guidance, mostly to governments, on how to improve the development and implementation of land rights and tenure governance systems. They spell out the recognition and protection of tenure rights, identify best practices for registration and transfer of tenure rights, make sure that tenure administrative systems are accessible and affordable, ensure that investment in agricultural lands occurs responsibly and transparently and include mechanisms for resolving disputes over tenure rights. The Guidelines contain a specific chapter regarding indigenous peoples' land rights, which makes several relevant recommendations with regard to protecting their rights. For example, section 7.3 states that: "Where States intend to recognize or allocate tenure rights, they should identify all existing tenure rights

<sup>106</sup> On this issue, see the Forest Peoples Programme's regular updates: <http://www.forestpeoples.org/topics/environmental-governance/international-processes/convention-biological-diversity-cbd>

<sup>107</sup> See, for example, UN-HABITAT, *Secure Land Rights for All* (UN-HABITAT, 2008); and see the Global Land Tool programme at <http://www.glttn.net/en>

and right holders, whether recorded or not.”<sup>108</sup> While not written directly to address land grabbing, the reference to States’ obligations to recognize indigenous peoples’ land rights even when national formal legal systems do not offers a very relevant tool in the context of land grabbing.

### **Principles for responsible agricultural investment that respects rights, livelihoods and resources**

Promulgated by the World Bank Group, the FAO, the International Fund for Agricultural Development (IFAD) and the UN Conference on Trade and Development (UNCTAD). The principles are:

- Principle 1: Existing rights to land and associated natural resources are recognized and respected.
- Principle 2: Investments do not jeopardize food security but rather strengthen it.
- Principle 3: Processes relating to investment in agriculture are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment.
- Principle 4: All those materially affected are consulted, and agreements from consultations are recorded and enforced.
- Principle 5: Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
- Principle 6: Investments generate desirable social and distributional impacts and do not increase vulnerability.
- Principle 7: The environmental impacts of a project are quantified and measures taken to encourage sustainable resource use, while minimizing the risk/magnitude of negative impacts and mitigating them.

Overall, however, these principles have largely been criticized by civil society actors as they represent an attempt to legitimize large-scale land acquisitions using the erroneous justification that such investments promote rural development.<sup>109</sup>

<sup>108</sup> The Guidelines are available at: <http://www.fao.org/docre/016/i2801e/i2801e.pdf>

<sup>109</sup> See: Saturino Borras, Jr. & Jennifer Franco, Comment, From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing, 13 YALE HUM. RTS. & DEV. L.J. 507 (2010), see also: Why We Oppose the Principles for Responsible Agricultural Investment (RAI): <http://focusweb.org/content/why-we-oppose-principles-responsible-agricultural-investment-rai>

### **EU land policy guidelines**

The EU Land Policy Guidelines adopted by the EU Council and Parliament are a common framework for the EU to interact with developing countries’ bilateral and multilateral donors. They include policy and operational sections which serve as practical tools for assessing land issues at national level. The aim is to provide some guidelines to EU governments and donors when they are engaged in supporting land policy design and land policy reform processes in developing countries.<sup>110</sup>

### **African Union Framework and Guidelines on Land Policy in Africa (2009)**

This land policy framework provides an overview of the importance of land policies throughout the continent. As such, it offers some guidance on conducting land reforms and their importance, notably highlighting the need to include all stakeholders. This guidance and the framework remain very limited when it comes to indigenous peoples, however. There is only one limited mention of indigenous peoples in the context of land-based discrimination. The AU framework mentions:

“Beyond the frequently acknowledged inequalities due to race, class and gender, the marginalization of particular ethnic groups with respect to access to adequate land remains a perpetual source of conflict. The marginalization of certain categories of indigenous people such as the San of Botswana; the Herero of Namibia; the Bakola, Bagyeli and Batwa of the countries of Central Africa; and the Ogiek of Kenya, has become contentious. Land policy reforms must also address these concerns.”<sup>111</sup>

However, this remains a very isolated statement regarding the rights of indigenous communities in Africa. There is a lack of integration and recognition of indigenous peoples’ rights in the document and, notably, regarding how these rights should be respected and integrated during land reform processes.

<sup>110</sup> The guidelines are available at: [http://ec.europa.eu/development/icenter/repository/EU\\_Land\\_Guidelines\\_Final\\_12\\_2004\\_en.pdf](http://ec.europa.eu/development/icenter/repository/EU_Land_Guidelines_Final_12_2004_en.pdf)

<sup>111</sup> Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods (2010), p. 9.

## CONCLUSIONS & RECOMMENDATIONS

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The main conclusions that can be reached with regard to land grabbing and indigenous peoples are as follows:

### 1. Land grabbing is specific, global, and here to stay

From an historical perspective, land grabbing is not a totally new phenomenon. Indigenous peoples have faced waves of land dispossessions over the previous centuries, with colonization being a tragic precedent. However, it is important to see the current land grabbing process for what it is. It is a new and global phenomenon as it is driven by massive investments in agribusiness, mining, biofuel production and other forms of large scale investments and mega projects. Investors see land and food production as safe, sound and long-term placements. What is specific about the current 'land grab' is the predominant role played by investors. This includes many different types of investors such as sovereign wealth funds, private equity funds, and other key investors in the food and agribusiness industry. It also appears that lending institutions play an important role in supporting such massive investments to acquire vast areas of lands. In this overall general context of land grabbing, the political, economic and legal frameworks usually favour the investors rather than the local communities. Laws and policies adopted by States, international financial organizations and investment funds mainly support the rights of the investors to acquire indigenous peoples' territories.

This phenomenon is global, although Africa seems to be particularly targeted, and there are indications of increased land grabs across the globe. There is no indication that the considerable increased investments in land acquisition will change in the near future. Quite the contrary, the current land grabbing is fed by an ever increasing demand for food production and biofuels, and the new mandatory blending policies will only exacerbate the rush for land on which to produce these biofuels. The focus on climate change offsetting measures will also only increase the pressure on land acquisition for long-term investments.

### 2. Indigenous peoples are among the primary and most vulnerable victims

Local communities, fisher people, pastoralists and peasants are all directly affected as their lands are often sold or leased to investors for little, if any, compensation. It seems, however, that the global rush for land investments particularly affects indigenous peoples. Indigenous peoples often do not hold formal title to their lands and their land rights are therefore not recognized or protected by governments. The large-scale land deals usually translate into the curtailing of customary or community access rights to lands, forest or natural resources, resulting in the loss of access to common land and waterways, such as hunting, gathering, forest products, fishing and grazing.

This global land grabbing is based on the wrong assumption, made by international institutions, States and private actors, that many lands are 'marginal', 'under-utilized' and 'empty' and should therefore receive massive investment which will, in turn, produce development. As with the colonial rhetoric, most of the lands that are seen as 'empty' or 'unproductive' are actually lands on which indigenous peoples live. Combined with the fact that indigenous peoples suffer from chronically poor legal protection of their land rights, disempowerment and lack of proper demarcation of their lands, this approach means that their right to live on their lands is in danger. Indigenous peoples are therefore particularly vulnerable targets of the global land rush.

### 3. The legal framework regarding land grabbing is complex

Land grabbing is protected and promoted via a complex web of interrelated legal and political frameworks, including investment regulations, contractual obligations, bilateral investment treaties and environmental agreements. This multiple layer of legal frameworks applicable to land deals makes it extremely complex to apprehend, and also creates a lack of clarity, transparency and certainty. The legal frameworks governing investments are extremely specialized, technical and



opaque, and have been designed to protect the investors not the local communities. Because 'land grabbing' is conducted by a multitude of non-State actors, notably investors and corporations, it also involves complex legal approaches relating to the obligations of non-State actors, notably regarding respect for human rights law. In this very complex legal framework, the human rights of indigenous peoples are very often ignored as norms protecting investments often infringe on indigenous peoples' land rights. In many of the countries concerned by land grabs, access to justice for indigenous peoples within a local setting is often an illusory option, either due to the fact that indigenous peoples' land rights are not formally recognized under local or national legal frameworks, due to lack of remedies, or due to weak judiciary processes. The application of international human rights - so hard won at the international level - represents an important framework to be used in these contexts. The international legal instruments adopted in recent years with regard to indigenous peoples' rights reflect the importance of land rights and highlight the need to address land dispossession. From this perspective, it is imperative that indigenous peoples' land rights become essential elements of any land deals signed across the globe.

## Recommendations

### To States:

- States should review their legislation to ensure compliance with indigenous peoples' rights as set out in the UNDRIP and ILO Convention 169, including their rights to land and natural resources;
- States should urgently address and focus on the violence, dispossession, forced eviction and oppression suffered by indigenous peoples as a direct or indirect consequence of land grabbing;
- States should include the requirement for free, prior and informed consent as a condition in all agreements with investors whose operations will potentially have an impact on indigenous communities;
- States should facilitate participatory community mapping of indigenous peoples' lands in order to empower local communities to assert their land rights and provide them with land titles;
- States should develop databases in which to systematically record and publish land deals in order to ensure more transparency and, ultimately, more accountability.

### To international institutions

- International financial and development institutions should not support and encourage any investment project which might negatively impact indigenous peoples' land rights. They should embrace and recognize indigenous peoples' right to free, prior and informed consent. International development agencies need to reject and challenge the wrongful discourses of 'vacant land', 'idle land' and 'wasteland'.
- International organizations supporting the development of new carbon trading initiatives need to ensure that indigenous peoples' land rights are integrated and respected in their initiatives. Indigenous peoples should be recognized as the legal owners of carbon credits generated from emissions reductions achieved within their territories.
- International arbitral tribunals and other forms of international investment arbitration need to integrate and respect the rights of indigenous peoples under international law when examining litigation relating to land investments.

### To the private sector

- Investors and corporations need to respect indigenous peoples' rights to land and natural resources before undertaking any projects. This obligation is not dependent on the national legislation of the State in which they operate, or on whether the rights to lands and natural resources have been demarcated and formalized.
- Investors and corporations need to ensure that a process that ensures free, prior and informed consent is in place before acquiring any lands which might belong to indigenous peoples.
- Investors should systematically scrutinize the law and contracts developed between States and businesses before they support any investment, making sure that these this legal framework protects and respects the rights of indigenous peoples.

### To Civil Society Organizations

- Civil society organizations should systematically target the investors to make sure they are aware of the negative impact that their investments can have on indigenous peoples' land rights.

- Civil society organizations not working with indigenous peoples and indigenous peoples' organizations should create more synergies to join their efforts to address the negative impact of land grabbing. Contemporary land grabbing affects many local communities and individuals, such as peasants, farmers and fisher people. Many local communities are losing their lands

to investors. This creates a momentum for civil society organizations to join efforts in pushing for lobbying, advocacy and law reform to achieve a greater place for land rights within international, regional and national policies. This may require greater and wider alliances between indigenous and non-indigenous organizations.

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## ABOUT THE AUTHOR

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**Jérémie Gilbert** is Professor of Human Rights Law at the University of Roehampton (United Kingdom). He has published various books, articles and book chapters on the rights of indigenous peoples, looking in particular at territorial rights. He often works with indigenous communities and their representative organisations on cases involving land rights. As a legal expert, he has been involved in providing legal briefs, opinions and carrying out evidence gathering in several cases involving indigenous peoples' land rights across the globe. He was one of the invited independent experts for the United Nations Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples (2006), and he has served as a consultant for the Expert Mechanism on the Rights of Indigenous Peoples (2015). He was a board member of IWGIA from 2012 to 2015.

Over the last few years, a massive increase in land investments - mainly in developing countries - has led to widespread grabbing of indigenous peoples' lands. This land dispossession and land grabbing constitutes one of the most serious problems for indigenous peoples worldwide since it leads to loss of traditional economic livelihood practices, the undermining of social organization and traditional institutions, and loss of cultural and spiritual practices. All of this causes poverty, food insecurity, social disintegration, and loss of human dignity. While the phenomenon is not new, as indigenous peoples' rights have historically been disregarded, there does seem to be an increase in the land grabbing and forced displacement now being suffered by indigenous communities globally.

This land grabbing is driven by a range of actors, including large-scale development and infrastructure projects, agro-investment projects, extractive industries, green energy activities such as biofuel production, and the establishment of National Parks and conservation areas. State and private actors such as corporations, but also international investors, are at the heart of the 'land rush', which does not comply with international legal standards regarding indigenous peoples' rights.

This report is based on a seminar on land grabbing and indigenous peoples' land rights organized by IWGIA in October 2014, in which IWGIA's partners from many parts of the world participated. The report analyses the nature and impact of land grabbing on the rights of indigenous peoples, presents cases from Kenya, Tanzania, India, Myanmar, Colombia, Chile and Russia, provides an overview of the international legal frameworks that can be used to combat land grabbing and offers recommendations to states, international institutions, the private sector and civil society organizations on how land grabbing could be addressed.



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